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ARTICLE

MUNICIPAL LIABILITY FOR POLICE MISCONDUCT
Michael P. Seng

COMMENTS

DIAMOND IN THE ROUGH: LOCAL LIABILITY FOR UNCONSTITUTIONAL CONDITIONS IN COUNTY JAILS—AN ANALYSIS OF JONES v. DIAMOND

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MUNICIPAL LIABILITY FOR POLICE MISCONDUCT

*Michael P. Seng**

I. INTRODUCTION

The absolute immunity from liability in civil rights actions under 42 U.S.C. section 1983,[1] formerly enjoyed by municipal corporations, has now been definitively withdrawn by the Supreme Court of the United States.[2] Indeed, in only two years, the Supreme Court has moved from the position that municipalities are absolutely immune, to the position that municipalities are strictly liable under section 1983.[3] In 1978, the Court held in

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[1] 42 U.S.C. § 1983 (Supp. III 1979) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Supreme Court in Martinez v. California, 445 U.S. 920 (1980), ruled that state courts may entertain § 1983 actions. This article, however, will concentrate on suits commenced in federal court.

[2] The Supreme Court had expressly held that municipal corporations could not be sued for damages in Monroe v. Pape, 365 U.S. 167, 191 (1961). Although local public entities were commonly named as defendants in suits in equity both prior to and after *Monroe*, the Supreme Court seemed to disapprove of this procedure in City of Kenosha v. Bruno, 412 U.S. 507, 513 (1973). Distinguishing § 1983, some lower courts held that municipal corporations could be named as defendants in actions filed under 42 U.S.C. § 1981 (1976). *See, e.g.*, Mahone v. Waddle, 564 F.2d 1018, 1031 (3d Cir. 1977) (city not immune from liability under § 1981 for police brutality); Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1160 (9th Cir. 1976) (water district not categorically immune from liability under § 1981); Rafferty v. Prince George's County, 423 F. Supp. 1045, 1058 (D. Md. 1976) (county not immune from liability under § 1981); Hines v. D'Artois, 383 F. Supp. 184, 190 (W.D. La. 1974) (police service board not immune from liability for equitable relief under § 1981); Washington v. Chester County Police Dep't, 300 F. Supp. 1279, 1281 (E.D. Pa. 1969) (police department not immune from liability under § 1981).

[3] Owen v. City of Independence, 445 U.S. 622, 665 (1980) (Powell, J., dissenting).

Monell v. Department of Social Services[4] that local governmental entities are "persons" to whom section 1983 applies and therefore are not wholly immune from suit under that statute.[5] Two years later, in *Owen v. City of Independence*,[6] the Court reaffirmed the rule in *Monell* and held that municipalities may not assert a qualified immunity, defense, or privilege based upon the good faith of the official involved in the deprivation of rights secured by the Constitution and laws.[7]

Consequently, it would seem that the only issue in any suit against a municipality under section 1983 is whether it has deprived the plaintiff of a protected constitutional or statutory right.[8] At first blush this is a simple question of causation. In both *Monell* and *Owen*, however, the Court emphasized that:

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.[9]

Although neither *Monell* nor *Owen* necessarily involved an attempt to impose liability under a theory of respondeat superior, the Court in each case specifically precluded any attempt

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[4] 436 U.S. 658 (1978).

[5] The Supreme Court has stated in dictum that the *Monell* ruling is not applicable to the states or to state governmental entities. Justice Brennan had previously indicated he would favor such an extension. Hutto v. Finney, 437 U.S. 678, 703 (1978) (Brennan, J., concurring). *Cf.* Thompson v. New York, 487 F. Supp. 212, 226-27 (N.D.N.Y. 1979) (court reluctantly held that state is not a person under § 1983). Justice Rehnquist, joined by six other justices, emphasized in Quern v. Jordan, 440 U.S. 332, 341 (1979) that *Monell* was a limited ruling and had not authorized suits against states under § 1983. *See, e.g.*, Familias Unidas v. Briscoe, 619 F.2d 391, 405 (5th Cir. 1980) (court followed *Quern* in dismissing § 1983 suit against a state and county). For this reason this article will focus on city ordinances, policies, and local law enforcement problems. The same analysis would seem to apply, however, if *Monell* should be interpreted in the future to apply to state law enforcement activities.

[6] 445 U.S. 622 (1980).

[7] *Id.* at 638.

[8] The Supreme Court has now affirmatively resolved the question whether an action will lie under § 1983 for federal statutory violations. Maine v. Thiboutot, 100 S. Ct. 2503 (1980).

[9] 445 U.S. at 633 (citing Monell v. Department of Social Servs., 436 U.S. at 694).

to premise future lawsuits on that theory.[10] The policy behind this rule is the result of two important observations. In *Owen*, the Court recognized that the effect of its earlier opinions allowing public officials to assert a good faith defense in actions for damages was to leave many victims remediless.[11] The Court noted that this was particularly true when the injury resulted from the interaction of several government officials, each of whom acted in good faith.[12] The *Owen* Court stated that one particular benefit of abrogating a municipality's good faith defense is the prevention of "systemic" injuries in which the plaintiff has clearly suffered harm but liability could not be established against any individual officer.[13] On the other hand, the Court was equally concerned that the municipality might be held liable for the acts of an officer not actually "caused" by the municipality's policies.[14] The Court stated that it was thus allocating costs in a section 1983 action among the victim, the officer who caused the injury, and the public, as represented by the municipal entity. This allocation of costs is guided by the accommodation arrived at by the Court:

> The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by "execution of a government's policy or custom, whether made by its lawmakers or by those

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[10] In only one previous case had the Supreme Court indicated that § 1983 liability could not be premised solely upon a respondeat superior rationale. *See* Rizzo v. Goode, 423 U.S. 362, 370-71, 376 (1976) (discussing the matter in the context of causation). *Rizzo* was not a suit for damages; the plaintiff had sought only to require supervisory officers to implement procedures to curb the incidence of police brutality by their subordinates.

[11] 445 U.S. at 651.

[12] *Monell* and *Owen* thus seem to open the door for a recovery, previously denied, against municipalities responsible for civil rights deprivations. *See, e.g.*, Burton v. Waller, 502 F.2d 1261, 1273 (5th Cir. 1974) (municipality not liable under § 1983 for shooting deaths of college students at hands of city police), *cert. denied*, 420 U.S. 964 (1975).

[13] 445 U.S. at 651.

[14] 436 U.S. at 692 & n.57.

whose edicts or acts may fairly be said to represent official policy."[15]

The accommodation reached by the Court is not entirely trouble-free. It can be assumed that defendants will still try to create gaps in which a plaintiff may be wronged but no recovery is possible. Furthermore, even where a plaintiff has a clear case against an officer, he will still need to sue the public entity if his remedy for damages is not to be illusory. Unless the defendant official is self-insured or is covered by a municipal or union insurance policy, any judgment in the plaintiff's favor will likely be uncollectible, especially where the amount of the judgment is substantial. Therefore, if the plaintiff expects to recover for his injuries, the funds will have to come from the municipality.

This article will pursue these considerations in the context of police misconduct and will delineate the circumstances under which a municipality may be held responsible for the misconduct of its police officers. In the following discussion, three varieties of police misconduct will be addressed. The first variety involves the arrest or detention of a suspect pursuant to a municipal law or policy that is illegal on its face. The second variety consists of certain abuses of process by law enforcement officials, excluding police brutality cases. The third variety is the traditional police brutality case. Although the same *Monell-Owen* principles apply in each of these situations, the factual contexts are sufficiently diverse to justify considering each case separately. Finally, this article will discuss specific problems of pleading, proof, and remedies common to all three forms of action for police misconduct.

II. Police Misconduct Pursuant to an Ordinance or Policy Illegal on its Face

A Jehovah's Witness distributes leaflets and is arrested by a police officer pursuant to a city ordinance banning the distribution of leaflets on public streets and sidewalks. Unable to post bond, the defendant is incarcerated until his appearance before the local magistrate when he is found guilty and fined fifty dol-

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[15] 445 U.S. at 657 (quoting Monell v. Department of Social Servs., 436 U.S. at 694).

lars. Although the defendant succeeds in having his conviction reversed on appeal,[16] this is the classic case where the innocent victim formerly was left without a remedy for damages. He could not sue the city council members who enacted the ordinance,[17] the prosecutor who charged him,[18] or the judge who found him guilty,[19] because they all enjoyed absolute immunity from suit. Similarly, the arresting officer's convincing defense was that he was enforcing an official city policy in good faith.[20] *Monell* and *Owen* now provide the Jehovah's Witness a remedy against the city, regardless of whether its officials knew or even should have known that the ordinance was unconstitutional.[21]

Formerly, a city could pass with impunity an ordinance effectively prohibiting blacks from using municipal swimming pools[22] or barring vagrants or other "undesirables" from the city.[23] The ordinance would serve its intended purpose until someone successfully challenged the act's constitutionality. Even then the city might achieve the same result by instituting a different but equally objectionable law. The realization by city officials that injured parties can now recover damages in suits against municipalities under *Monell* and *Owen* should eliminate

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[16] *See, e.g.*, Schneider v. State, 308 U.S. 147, 153-54, 165 (1939) (reversal of four convictions under city ordinances prohibiting or regulating the distribution of literature in public places).

[17] *See* Tenney v. Brandhove, 341 U.S. 367, 377 (1951) (legislative immunity); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 613-14 (8th Cir. 1980) (absolute immunity for municipal legislators).

[18] *See* Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (prosecutors enjoy absolute immunity under § 1983).

[19] *See* Stump v. Sparkman, 435 U.S. 349, 356 (1978) (judicial immunity not abrogated by § 1983); Pierson v. Ray, 386 U.S. 547, 553-55 (1967) (same).

[20] *See* Pierson v. Ray, 386 U.S. 547, 557 (1967) (common law defense of good faith available to police officers in § 1983 actions).

[21] The *Owen* opinion expressly rejected any defense by the municipality that its actions were "legislative" rather than "ministerial." 445 U.S. at 644. A defense by the municipality that the Jehovah's Witness assumed the risk of arrest and prosecution likewise would prove unsuccessful. Because the ordinance was void, the petitioner could properly ignore it without first resorting to an action in equity or a suit for declaratory relief. *See* Lovell v. Griffin, 303 U.S. 444, 452 (1938) (one may wait until charged to challenge an ordinance void on its face).

[22] *See* Palmer v. Thompson, 403 U.S. 217, 219 (1971) (closing of city pools to all persons).

[23] *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 161 (1972) (municipal vagrancy ordinance).

such blatant misconduct. In addition, under the balance struck in *Owen*, even those city officials who are conscientious will be forced to give greater consideration to the constitutional implications of the ordinances and policies which they choose to enforce. Consequently, if the officials harbor any doubts about the lawfulness of their intended action, they will have greater incentive "to err on the side of protecting citizens' constitutional rights."[24]

Municipal liability under *Monell* and *Owen* is not limited to those situations where a positive law enacted by the city is held unconstitutional on its face. As explained in parts III and IV of this article, a custom may also give rise to municipal liability "even though such a custom has not received formal approval through the body's official decision making channels."[25] Although not authorized by written law, customs are those practices of a municipality that are so permanent and well-settled as to transform merely private predilections into compulsory rules of behavior.[26] Thus, a city may well be answerable if it is the routine practice for police to stop blacks who are on the streets after dark in certain areas ofapproval
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[24] 445 U.S. at 652.

[25] Monell v. Department of Social Servs., 436 U.S. at 691.

[26] *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 168 (1970). The Court, quoting Representative Garfield, stated that a "systematic maladministration" of laws equal and just on their face or a "neglect or refusal to enforce their provisions" could constitute a custom or usage within the ambit of § 1983. *Id.* at 167. The Court noted that the statute's scope was limited: although § 1983 was meant to provide a remedy for constitutional deprivations stemming from official failure to enforce duties owed under existing laws, it was not meant to provide a remedy for constitutional deprivations arising from official failure to enact corrective legislation. *Id.* at 167 n.39; *see* Supreme Court v. Consumers Union, 446 U.S. 719, 731-34 (1980) (Supreme Court of Virginia, acting in legislative capacity, enjoyed absolute legislative immunity for failure to lift ban against attorney advertising); Mayes v. Elrod, 470 F. Supp. 1188, 1192 (N.D. Ill. 1979) (liability for failure to enact corrective legislation not within scope of § 1983).

[27] In Rizzo v. Goode, 423 U.S. 362 (1976), minority citizens alleged a pervasive pattern of police mistreatment. The district court ordered city officials to draw up guidelines for handling citizen complaints alleging misconduct, and the Third Circuit affirmed. The Supreme Court, concluding there was no "affirmative link" between the misconduct complained of and the approval of municipal policymakers, reversed. *Id.* at 380-81. Thus, for instance, the all-white Chicago suburb of Cicero could be held liable for an injury to a black if it could be proven that the injury was caused by an official policy not to afford police protection to blacks who come into the town. *See* Thompson v. New York, 487 F. Supp. 212, 227 (N.D.N.Y. 1979) (withdrawal of police protection may be categorized as a

such blatant misconduct. In addition, under the balance struck in *Owen*, even those city officials who are conscientious will be forced to give greater consideration to the constitutional implications of the ordinances and policies which they choose to enforce. Consequently, if the officials harbor any doubts about the lawfulness of their intended action, they will have greater incentive "to err on the side of protecting citizens' constitutional rights."[24]

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regardless of whether the practice was instituted by the city council or by the police department itself.[28] If an agency or a department has the authority or, in a more informal sense, is free to set its own policies or priorities, its edicts and acts should represent "official policy" for which the city is ultimately responsible.[29] In *Owen*, the Court expressed the hope that the

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policy under § 1983); Huey v. Barloga, 277 F. Supp. 864, 874 (N.D. Ill. 1967) (public officials are not always immune from suit for failure to provide police protection). Similarly, Cairo, Illinois might be liable for injuries suffered as a result of the concerted efforts of law enforcement officials to prevent blacks from exercising their first amendment right to protest racial injustice. *See* Littleton v. Berbling, 468 F.2d 389, 402 (7th Cir. 1972) (§ 1983 action against county officials for systematic discriminatory application of criminal law), *rev'd in part sub nom.* O'Shea v. Littleton, 414 U.S. 488, *vacated and remanded in part sub nom.* Spomer v. Littleton, 414 U.S. 514 (1974).

In Mayes v. Elrod, 470 F. Supp. 1188 (N.D. Ill. 1979), a cause of action for damages was found to exist against Cook County, Illinois. A jail inmate sued the county and its officials for violating his eighth amendment rights. He alleged that living conditions in the Cook County Jail were inhumane and that, as a result of lax security and overcrowding, he had been subjected to assaults and rape. He further alleged that his injuries were directly caused by the defendants' continuing practice of underfunding county corrections programs. Judge Prentice Marshall denied the county's motion to dismiss. Finding a statutory duty on the part of the county to keep jails repaired and in suitable condition, the judge held that the persistent maladministration or nonenforcement of the county's mandatory duty could amount to an official custom within the scope of § 1983. *Id.* at 1193.

[28] *See* Sala v. County of Suffolk, 604 F.2d 207 (2d Cir. 1979), *cert. granted, vacated and remanded*, 446 U.S. 903 (1980) (remanded for further consideration in light of *Owen*). The Second Circuit had held that the county was not liable in damages for a policy of the sheriff's department requiring the strip search of all women taken into custody because the department had adopted the policy in good faith. 604 F.2d at 209-11.

[29] The court in Turpin v. Mailet, 579 F.2d 152, 164 (2d Cir.), *vacated*, 439 U.S. 988 (1978), *modified and remanded*, 591 F.2d 426 (2d Cir. 1979), held that "a damage action can be maintained against a municipality to redress injuries resulting from those actions of its employees that have been authorized, sanctioned or ratified by municipal officials or bodies functioning at a policy-making level." 579 F.2d at 164. However, the district court in Smith v. Ambrogio, 456 F. Supp. 1130 (D. Conn. 1978), narrowly construed *Turpin* to refer only "to those making what can realistically be considered the policy of the town, rather than all officials at any level of authority within the town government exercising discretion and thereby in some sense creating policy guiding the actions of subordinates." *Id.* at 1134. *Smith* was decided before the Supreme Court's most recent decision in *Owen*.

The determination of who makes official policy for the city will presumably be a mixed question of law and fact decided on a case-by-case basis. *See* Schneider v. City of Atlanta, 628 F.2d 915, 920 (5th Cir. 1980) (city sued for racial discrimination in discharge of employee; whether director of bureau of corrections had final authority to make personnel decisions was question of fact); Stinson v. Sheriff's Dep't, 499 F. Supp. 259, 265 (S.D.N.Y. 1980) (whether official policy existed dependent on surrounding facts and cir-

threat of damages would encourage those in policy-making positions to institute internal rules and programs designed to minimize the likelihood of objectionable conduct by their subordinates.[30] Thus, the Court issued a clear warning: municipalities cannot insulate themselves from liability by allowing policies to be shaped informally by subordinate officials rather than taking action at the top.[31] Whichever course a city chooses as a way of defining city policy that policy is "officially" the city's, and the public will be called upon to bear the cost of it.

III. Abuses of Process

A second variety of police-citizen tension is created when the police violate personal rights while enforcing an otherwise valid law or custom. Generally included in this category are those situations where the officer makes an illegal arrest under an otherwise valid city ordinance. For example, in *Gregory v. City of Chicago*,[32] police enforced a disorderly conduct ordinance against civil rights protestors in violation of the demonstrators' first amendment rights. Similarly, in *Cantwell v. Connecticut*,[33] a Jehovah's Witness who played a recording offensive to Catholics was arrested for inciting a breach of the peace. Recovery of damages against individual officers would be difficult in both situations. Nevertheless, these appear to be the very situations in which the *Owen* Court intended the municipality to

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cumstances). State laws and municipal ordinances allocating power and delegating responsibilities as well as actual practices will be relevant to the policy-making power determination. If a single official's judgment can be said to bind the city, then the city should be required to accept the responsibility. *See* Schnapper, *Civil Rights Litigation after Monell*, 79 Colum. L. Rev. 213, 215-40 (1979) (factors relevant to a determination of who represents city or county policy); Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980) (judge's enforcement of state statute not a policy-making act). *But see* Katris v. City of Waukegan, 498 F. Supp. 48, 52 (N.D. Ill. 1980) (mayor's actions, pursuant to authority conferred by city council, were those of municipality).

[30] 445 U.S. at 652.

[31] *Id.* On the facts, the *Owen* Court rejected a narrow definition of "official" action. The Court concluded that the discharge of police chief Owen by the city manager, in violation of Owen's procedural and substantive due process rights, was concerted, systematic conduct that could be said to represent "official" city policy. *Id.* at 657.

[32] 394 U.S. 111, 112 (1969).

[33] 310 U.S. 296, 301-03 (1940).

be liable.[34] If the arrest was ordered as part of a pervasive scheme to harass demonstrators, then "official" liability is clear.[35] Similarly, even if the decision to arrest was an individual officer's, it still was an "official" determination to take someone into custody.[36] This is particularly true where the city ratifies the arrest by prosecuting the person arrested rather than discharging him.[37] In this situation, the municipality is unquestionably directing the illegal proceeding.

An abuse of process may also occur where an officer errs in determining whether probable cause exists for an arrest or search. For example, an officer's arrest of a man for burglary on only the most general of descriptions,[38] or an entry into a private home without a warrant in order to arrest a suspect,[39] may constitute an abuse of process. Although liability for damages can be imposed against an officer who acts in an unreasonable manner,[40] a favorable verdict will be meaningless if the defendant is judgment proof. Because immunity is unavailable to the public entity as a defense[41] and because the city has a "deeper pocket" than any individual officer, victims of police misconduct are finding it increasingly attractive to sue the municipality.

The defense which the municipality will invariably raise is

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[34] 445 U.S. at 657-58.

[35] *See* Allee v. Medrano, 416 U.S. 802, 811, 815 (1974) (Court affirmed injunction against policy upon a showing of persistent pattern of police misconduct); Hague v. CIO, 307 U.S. 496, 505, 517 (1939) (injunctive relief ordered against city officials who adopted and enforced a policy forbidding plaintiffs from holding public meetings in city).

[36] *See* notes 46 through 49 and accompanying text *infra*.

[37] *See* note 49 and accompanying text *infra*.

[38] People v. Byrd, 47 Ill. App. 3d 804, 365 N.E.2d 443, 446 (App. Ct. 1977); *see* Delaware v. Prouse, 440 U.S. 648, 648 (1979) (random stop of motorist in absence of specific articulable facts justifying the stop held constitutionally impermissible); Davis v. Mississippi, 394 U.S. 721, 726-27 (1969) (evidence was inadmissible where police detained petitioner and obtained fingerprints without probable cause).

[39] Payton v. New York, 445 U.S. 573, 574-75 (1980).

[40] *Compare* Pierson v. Ray, 386 U.S. 547, 557 (1967) (if officers "reasonably believed in good faith" that arrest was constitutional, they could not be held liable if arrest was in fact unconstitutional) *with* Butler v. Goldblatt Bros., 589 F.2d 323, 325-26 (7th Cir. 1978) (arrest made without probable cause; good faith defense under § 1983 inapplicable), *cert. denied*, 444 U.S. 841 (1979) *and* Joseph v. Rowlen, 402 F.2d 367, 370 (7th Cir. 1968) (police officer liable for damages where arrest made without a warrant or probable cause).

[41] Owen v. City of Independence, 445 U.S. at 657.

that liability cannot be premised on a theory of respondeat superior[42] and that a local governmental entity can be liable only for the execution of its "official" policies and customs.[43] The municipality will deny that the officer acted pursuant to "official" policy and indeed will attempt to show that he violated "official" policy in making the illegal search or seizure.[44] The municipality, in a futile attempt to regain immunity, may also try to introduce legislation requiring officers to act in accordance with the laws and the Constitution of the United States.[45]

The city's defense should not be accepted. One can argue that the officer who performs an arrest or a search does so as an "official" representative of the public. His judgment may indeed be erroneous, but he has been designated to make that judgment on the public's behalf. Just as a city council or county legislature has been delegated power "officially" to enact ordinances,[46] and just as a city manager has been delegated power "officially" to discharge a municipal employee,[47] so a police officer has been delegated power "officially" to make arrests and conduct searches. In this narrow sphere, his edicts and acts represent official policy for which the public should be ultimately answerable.[48] Again, this is especially true when the city subsequently ratifies the policeman's conduct by prosecuting the person arrested. The city should not be permitted to dispute the extent of the officer's authority. If the city intends to use the fruits of an arrest or search to prosecute wrongdoers, then it should be willing to accept the consequences should the arrest or search be

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[42] *E.g.*, Monell v. Department of Social Servs., 436 U.S. at 691. The Court stated: "a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." *Id.*

[43] *Id.* at 690-91.

[44] *Cf. Ex parte* Young, 209 U.S. 123, 159-61 (1908) (if state official's acts are unconstitutional, he is individually answerable for his acts).

[45] Schnapper, *supra* note 29, at 231.

[46] Monell v. Department of Social Servs., 436 U.S. at 690.

[47] Owen v. City of Independence, 445 U.S. at 663 & n.13.

[48] *Id.* at 654-55, 657. *Compare* Turpin v. Mailet, 579 F.2d 152, 164 (2d Cir. 1978) (municipality liable in damages when its employees' actions authorized, sanctioned, or ratified at municipal policy-making level) *with* Smith v. Ambrogio, 456 F. Supp. 1130, 1134 (D. Conn. 1978) (city officials who possess authority or exercise discretion do not necessarily make town policy).

deemed illegal. Thus, the only way a municipality should be allowed to limit its liability is to withdraw completely the police officer's power to arrest or search.[49]

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[49] The authorities have not adopted such a policy. In Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980), a county judge, in compliance with a county school board request and pursuant to an unconstitutional Texas statute, exacted disclosure of the membership lists of organizations that sought to interfere with the operation of public schools. In a suit for damages under § 1983, the Fifth Circuit held for the county. The court reasoned that the judge had not acted in a capacity in which his "edicts or acts may fairly be said to represent official [county] policy." *Id.* at 404 (quoting Monell v. Department of Social Servs., 436 U.S. at 694). Instead, the judge was enforcing "the policy of the State of Texas . . . , for which the citizens of a particular county should not bear singular responsibility." 619 F.2d at 404.

One commentator argues for an intermediate position. *See* Schnapper, *supra* note 29, at 221-23. He reasons that a city should be held liable where it allows officers to make ad hoc decisions but not where it has enacted specific rules and regulations circumscribing the authority of the officer. *Id.* at 221-22. While this argument is sound in the abstract, it is doubtful that sufficiently specific rules could be enacted to curtail or eliminate judgments by individual officers. *Id.* at 222-23. Additionally, in most instances the city will readily accept the officer's judgment if it is ultimately upheld by the courts but repudiate it if it is not.

In suits for damages against a municipality, the plaintiff may also argue that his arrest or search was part of a city-wide policy or custom which supported false arrests or illegal searches. Ellis v. City of Chicago, 478 F. Supp. 333, 335-36 (N.D. Ill. 1979) (amended complaint presented factual question whether repeated fourth amendment violations perpetrated against plaintiffs by Chicago police constituted city "policy or custom"). *See* Part II of text and accompanying footnotes *supra*. As further developed in Part IV *infra*, the plaintiff can also argue that the municipality by its inaction has improperly trained or supervised its officers, or has shown "deliberate indifference" to or ratified the conduct of its officers, or in some other way has directly contributed to the injury sustained by the plaintiff.

The same reasoning that would hold a municipality liable for abuses of process committed by police officers would hold a city liable when a prosecutor secures an indictment or conviction by the knowing use of perjured testimony. While public policy supports an absolute immunity for the prosecutor, *see* Imbler v. Pachtman, 424 U.S. 409, 427 (1976), no similar public policy supports an immunity for the local governmental entity.

Of course, in all of these cases, municipal liability is premised on the invasion of a right protected by the laws or Constitution of the United States. Thus, an innocent person arrested pursuant to a valid warrant or with probable cause probably cannot recover under § 1983. *See* Pierson v. Ray, 386 U.S. 547, 555, 557 (1967) (police officers' common law defenses preserved under § 1983); *cf.* Baker v. McCollan, 443 U.S. 137, 146 (1979) (§ 1983 imposes liability for violations of rights secured by the Constitution, not for violations of duty of care). However, the Court in *Baker* left open the question whether extended confinement after authorities reasonably should have determined that a detainee is innocent would violate a constitutionally protected liberty interest. *Id.* at 145. In such a situation, the police and jailer probably have a good faith defense, *see* note 40 *supra*, while the judge and prosecutor enjoy absolute immunity. Stump v. Sparkman, 435 U.S.

The argument for an extension of municipal liability is supported by the Court's opinion in *Owen*. Although the Court expressed hope that the threat of liability would increase the attentiveness with which higher officials supervise their subordinates[50] and would "encourage those in a policymaking position to institute internal rules and programs designed to *minimize* the likelihood of unintentional infringements on constitutional rights,"[51] it did not imply that by instituting such measures the municipality necessarily would escape liability. This conclusion is buttressed by the Court's adoption of the loss-spreading principle that "when it is the local government itself that is responsible for the constitutional deprivation—it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government, rather than to let the entire burden fall on the injured individual."[52] Imposition of liability upon the municipality in these situations will further the objective articulated by the Court—that innocent individuals should be assured compensation for injuries sustained as the result of an abuse of governmental authority.[53]

IV. Police Brutality

The third variety of police misconduct can be denominated police brutality. Distinguished from the situation in which the officer acted pursuant to a law or custom unconstitutional on its face or the situation involving an illegal arrest or search, it is unlikely that a finder of fact will conclude that an officer acted in good faith when the latter beat a suspect. Nonetheless, the reasons discussed earlier for trying to impose liability on the public entity are especially applicable here. Since damages resulting from police brutality can be substantial, it is crucial to find a "deep pocket" in these cases. Furthermore, the potential for such abuses should be minimized if municipal treasuries are

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349, 363-64 (1978); Imbler v. Pachtman, 424 U.S. 409, 427 (1976). Again, this is the type of systemic injury, referred to in *Owen*, where liability should be borne by the public. 445 U.S. at 657-58.

[50] 445 U.S. at 652 n.36.

[51] *Id.* at 652 (emphasis added).

[52] *Id.* at 655 n.39.

[53] *Id.* at 657.

threatened. However, the Court in *Monell* expressly rejected premising municipal liability on a theory of respondeat superior.[54] An argument can and should be made that, when the city has failed to promulgate specific rules to prevent police brutality, it has delegated that power to the officers. However, the lower courts, rejecting the theory that officers automatically are policymakers in such instances, have required plaintiffs to demonstrate that the municipality caused the unconstitutional deprivation.[55] As the existing decisions indicate, this is not an easy task.

To establish liability against a municipality, it is generally required that there be some "affirmative link" between the actions or policies of the city and the unconstitutional deprivation.[56] The municipality will be held responsible only if it is shown to be "culpable" in its own right.[57]

The easiest way to establish an "affirmative link" or "culpability" is to show an articulated policy favoring or promoting police brutality. Such an articulated policy may be shown through a state statute or city ordinance authorizing unconstitutional conduct[58] or through a police department regulation outlining unconstitutional procedures.[59] For obvious reasons, the cases

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[54] Monell v. Department of Social Servs., 436 U.S. at 691.

[55] *See, e.g.*, Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir. 1979) (federal prisoner, injured by corrections officers while in county jail, stated a cause of action for deprivation of rights); Turpin v. Mailet, 579 F.2d 152, 168 (2d Cir.) (municipality liable for unconstitutional arrest of appellant where employees' actions were authorized or sanctioned at the policy-making level), *vacated*, 439 U.S. 988 (1978), *modified and remanded*, 591 F.2d 426 (2d Cir. 1979); Molina v. Richardson, 578 F.2d 846, 847-48 (9th Cir. 1978) (city immune from suit where plaintiff failed to argue that police officers' allegedly illegal conduct could fairly be said to represent the city's official policy); Knight v. Carlson, 478 F. Supp. 55, 58 (E.D. Cal. 1979) (county may be liable if employees of sheriff's department were untrained as a result of county policy); Popow v. City of Margate, 476 F. Supp. 1237, 1246 (D.N.J. 1979) (city may be liable if its procedure for reprimand is so inadequate as to ratify unconstitutional conduct by police officers); Leite v. City of Providence, 463 F. Supp. 585, 591 (D.R.I. 1978) (municipality may be held liable if training of police force was nonexistent, reckless, or grossly negligent).

[56] Rizzo v. Goode, 423 U.S. 362, 371, 376 (1976) (mere right to control, without exercise of control or failure to supervise, insufficient to establish § 1983 liability).

[57] Turpin v. Mailet, 579 F.2d 152, 166 (2d Cir. 1978).

[58] *See* Garner v. Memphis Police Dep't, 600 F.2d 52, 53 (6th Cir. 1975) (statute authorized officers to shoot fleeing felons).

[59] In Duchesne v. Sugarman, 566 F.2d 817, 832 (2d Cir. 1977), the court held that

where such an affirmative link can be established will be rare.

In most cases, therefore, "culpability" will have to be proven either by demonstrating that city policymakers affirmatively intervened to cause the abuse, or by showing such a pervasive pattern and practice of abuse as to indicate a city policy which supports it.[60] In either situation, the familiar tort principle that one intends the natural consequences of his acts should govern.

One can establish municipal "culpability" by showing that persons in policymaking positions have affirmatively directed the misconduct.[61] In some situations policymakers will single out special groups for harassment. For instance, in *Hague v. CIO*,[62] the Supreme Court found that the mayor, the director of public safety, the police chief, and city commissioners were collectively engaged in a policy of harassing labor organizers.[63] Similarly, in *Allee v. Medrano*,[64] the Court found a continuing pattern of harassment and violence by the Texas Rangers against farm union organizers.[65] If city policymakers are directly implicated in such actions, liability should be clear. Liability will be more difficult to establish, however, where it is premised on a theory that officials, by their inaction, have allowed such practices to persist. In

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plaintiffs could try to show that policies and procedures in a welfare manual proximately caused the unconstitutional action of city welfare workers in taking and retaining custody of plaintiffs' children without benefit of a hearing or court order.

[60] *See* Monroe v. Pape, 365 U.S. 167, 187 (1961) (overruled on other grounds by *Monell*); *cf.* Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969), where the court stated: "From a legal standpoint, it makes no difference whether the plaintiff's constitutional rights are violated as a result of police behavior which is the product of the active encouragement and direction of their superiors or as a result of the superiors' mere acquiescence in such behavior." *Id.* at 1086.

[61] *See* Turpin v. Mailet, 579 F.2d 152, 164 (2d Cir. 1978) (actions authorized, sanctioned, or ratified by municipal policy-making officials or bodies). It is sometimes difficult to determine whether an official is a policymaker. Certainly police chiefs, especially those authorized to formulate department policy, should be considered policymakers under *Monell* and *Owen*. The policy-making status of officials at lower levels of the municipal hierarchy should be judged on the facts of each case. *But cf.* Smith v. Ambrogio, 456 F. Supp. 1130, 1134 (D. Conn. 1978) (construing *Turpin* to refer only to those officials who institute town policy and not officials at every level).

[62] 307 U.S. 496 (1939).

[63] *Id.* at 505.

[64] 416 U.S. 802 (1974).

[65] *Id.* at 804-09.

Rizzo v. Goode,[66] plaintiffs produced approximately 250 witnesses to testify to numerous incidents of brutality by Philadelphia police officers. Nonetheless, the Supreme Court refused to find any "affirmative link" between those occurrences and the adoption of any plan or policy—"express or otherwise—showing . . . approval of such misconduct."[67]

Municipal inaction, manifested in a failure to train or supervise officers properly, may be the direct cause of a deprivation of civil rights. Similarly, municipal inaction in the face of a pervasive pattern or practice of police brutality may denote official acquiescence in or ratification of that misconduct. Despite apparent improprieties by officials, the possibility of imposing liability in these circumstances is still uncertain.[68]

Supervisory officials have been found culpable for inaction when laws or regulations of the state or locality impose a duty to act and the officials' inaction results in an unconstitutional deprivation.[69]Hence, if there is a breach of state laws requiring min-

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[66] 423 U.S. 362 (1976).

[67] *Id.* at 371. *Compare id.* (no official custom or policy linked to illegal conduct by police officers) *with* Ellis v. City of Chicago, 478 F. Supp. 333, 336 (N.D. Ill. 1979) (amended complaint, citing four specific instances in which officers invaded plaintiffs' fourth amendment rights, may have illustrated a "custom or policy").

[68] *See, e.g.*, Turpin v. Mailet, 619 F.2d 196, 202-04 (2d Cir. 1980) (although official policy may be inferred from omissions of municipal officials, police commissioner's failure to discipline officer insufficient to establish indifference to rights of arrestee); Mayes v. Elrod, 470 F. Supp. 1188, 1194 (N.D. Ill. 1979) (superior's failure to act insufficient to establish liability in absence of a pervasive, regular pattern of violations); Smith v. Ambrogio, 456 F. Supp. 1130, 1135-37 (D. Conn. 1978) (same).

In Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977), the court stated:

> Where conduct of the supervisory authority is directly related to the denial of a constitutional right it is not to be distinguished, as a matter of causation, upon whether it was action or inaction. . . . "[N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination."

Id. at 832 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)).

[69] *See, e.g.*, Sims v. Adams, 537 F.2d 829, 832 (5th Cir. 1976) (plaintiff stated § 1983 cause of action against mayor and police chief for negligent failure to control officer with known propensity for use of force); Roberts v. Williams, 456 F.2d 819, 822-23 (5th Cir.) (superintendent of prison farm negligently failed to train guard in use of weapon), *cert. denied*, 404 U.S. 866 (1971); Carter v. Carlson, 447 F.2d 358, 365 (D.C. Cir. 1971) (cap-

imum police training, supervision, or other standards of conduct, courts have imposed liability. However, caution in relying on these precedents is advised. Some language in *Rizzo* indicates that mere inaction, even though premised on a breach of duty, will still not be sufficient to establish supervisory responsibility.[70] Recently, however, the Court in *Monell* construed the language in *Rizzo* to mean only that "the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability."[71] This has led one lower court to conclude that inaction combined with the exercise of some control may be a sufficient basis upon which to found supervisory responsibility.[72]

Courts have not hesitated to impose liability for inaction which is so reckless or so grossly negligent as to show "deliberate indifference."[73] For example, providing line officers with firearms without giving them any training or instruction on their use

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tain and chief of police subject to § 1983 suit for negligent failure to train officer who deprived plaintiff of constitutional rights), *rev'd on other grounds*, 409 U.S. 418 (1973); Moon v. Winfield, 368 F. Supp. 843, 845 (N.D. Ill. 1973) (chief of police subject to § 1983 suit for negligent failure to act on 13 misconduct complaints against a single officer); *cf.* Duchesne v. Sugarman, 566 F.2d 817, 832 n.31 (2d Cir. 1977) (question presented whether state and local law imposed duty on commissioner of welfare bureau to control employees who took children from mother and retained custody without her consent).

[70] *See* Rizzo v. Goode, 423 U.S. at 376 (plaintiff's theory of recovery blurred issues and amounted to an amorphous proposition which the Court declined to consider).

[71] 436 U.S. at 694 n.58.

[72] Mayes v. Elrod, 470 F.Supp. 1188, 1194 (N.D. Ill. 1979).

[73] Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir. 1979); Mayes v. Elrod, 470 F. Supp. 1188, 1194 (N.D. Ill. 1979); Leite v. Providence, 463 F. Supp. 585, 590-91 (D.R.I. 1978); Perry v. Elrod, 436 F. Supp. 299, 302 (N.D. Ill. 1977). The "deliberate indifference" standard was articulated by the Supreme Court in Estelle v. Gamble, 429 U.S. 97, 106 (1976), a suit against prison officials under the eighth amendment for their failure to provide medical care to penitentiary inmates. However, in Edmonds v. Dillin, 485 F. Supp. 722 (N.D. Ohio 1980), the court held that the "deliberate indifference" standard should be limited to eighth amendment cases and formulated its own standard for "police training" cases:

> If a municipality completely fails to train its police force, or trains its officers in a manner that is in reckless disregard of the need to inform and instruct police officers to perform their duties in conformity with the constitution, and if the municipality might reasonably foresee that unconstitutional actions of its police officers might be committed by reason of the municipality's failure or reckless disregard, then the municipality would have implicitly authorized or acquiesced in such future unconstitutional acts.

Id. at 727.

might well be so reckless as to evidence "deliberate indifference" to the rights of the public on the part of those in authority.[74] "Deliberate indifference," while most easily established in pattern and practice cases, may also be proved by a single incident.[75]

A final way to establish municipal "culpability" is to show that the city has ratified police misconduct.[76] As discussed above, such culpability may be difficult to establish simply by showing inaction by the city, *i.e.*, that it has failed to set up a police review mechanism. However, if a city creates such a program, its failure to administer it properly may be actionable.[77] Ratification may also be found where the city or its police review board consistently condones police misconduct despite repeated complaints or where the city rewards or promotes officers who engage in police brutality.

In the final analysis, whichever theory one employs for imposing liability against municipalities for police brutality, proof of causation will be the key to recovery.[78] Has the plaintiff's injury resulted from some fault of the municipality itself?[79] If the officer truly acted on his own, plaintiffs presumably will have to be content with recovering damages from him alone.[80] If one can demonstrate, however, that the city, through its "policy-making" officials, either directed or in a meaningful way allowed the bru-

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[74] *Cf.* Roberts v. Williams, 456 F.2d 819, 822-23 (5th Cir.) (superintendent of prison farm negligently failed to train guard in use of weapon), *cert. denied*, 404 U.S. 866 (1971).

[75] *Compare* Turpin v. Mailet, 619 F.2d 196, 202 & n.7 (2d Cir. 1980) (a single incident may establish a basis for liability) *and* Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir. 1979) (same) *with* Popow v. City of Margate, 476 F. Supp. 1237 (D.N.J. 1979) (rejecting view that a single brutal incident is sufficient to establish municipal liability).

[76] Turpin v. Mailet, 619 F.2d 196, 201 (2d Cir. 1980); Cook v. City of Miami, 464 F. Supp. 737, 739 (S.D. Fla. 1979).

[77] *See* Popow v. City of Margate, 476 F. Supp. 1237, 1247 (D.N.J. 1979) (city's inadequate maintenance of its review procedure for police shooting incidents may have led officers to believe their unconstitutional conduct would not subject them to any discipline).

[78] *See* Monell v. Department of Social Servs., 436 U.S. at 691 (municipality cannot be held liable on basis of respondeat superior; constitutional tort must be caused by official policy).

[79] *Id.*; *see* notes 54 through 78 and accompanying text *supra*.

[80] 436 U.S. at 691; *see* notes 54 through 57 and accompanying text *supra*.

tality to occur, then the city should be held culpable.[81] In *Owen*, the Court suggested that the threat of damages will encourage cities to institute internal procedures to minimize abuses and will encourage officials at higher levels to supervise more closely the conduct of their subordinates.[82] In cases involving municipal culpability, the courts should recognize that police brutality is less likely to occur if officers are properly trained and supervised and if the department has adopted and enforced strict policies prohibiting police misconduct. The absence of such checks and protections should establish a prima facie case of municipal liability.[83] *Owen* clearly indicates that municipalities cannot insulate themselves from liability by declining to take action at the top,[84] and simple justice demands that the person injured by municipal action or inaction be compensated.

V. Pleading and Proof

Because municipal liability under section 1983 is such a recent development, many of the reported cases have involved preliminary questions of pleading. Although the federal rules require that pleadings be "simple, concise, and direct,"[85] some courts have required that a cause of action against a municipality be pled with greater specificity.[86] Thus, in *Smith v. Ambrogio*,[87] the Federal District Court for the District of Connecticut ruled that the complaint should state facts which clearly articulate the level of decisionmaking or the identity of agents whose actions are deemed to reflect town policy. The court found that in a pattern and practice case this was justified to ensure that neither the court nor the municipality be burdened with an un-

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[81] *See* notes 60 through 78 and accompanying text *supra*.

[82] 445 U.S. at 652.

[83] *See generally* Schnapper, *supra* note 29, at 223.

[84] *See* Owen v. City of Independence, 445 U.S. at 652 (encouraging programs to minimize possibility of constitutional violations).

[85] Fed. R. Civ. P. 8(3) (1).

[86] *See* Smith v. Ambrogio, 456 F. Supp. 1130, 1137 (D. Conn. 1978) (requirement of fact pleading appropriate; pleader must specify overt acts forming basis of unconstitutional action); *cf.* Leite v. City of Providence, 463 F. Supp. 585, 591 (D.R.I. 1978) (allegations of simple negligence insufficient to state a claim against municipality under § 1983).

[87] 456 F. Supp. 1130 (D. Conn. 1978).

warranted action.[88] Although this special rule is not in accord with the federal policy favoring notice pleading,[89] plaintiffs nevertheless are well advised to be as specific as possible in their pleadings.

Assuming that the pleadings adequately state a cause of action, the plaintiff then must determine what evidence can be garnered to prove the city's responsibility. As previously explained, the evidence required to establish the existence of an official policy will depend on the character of the misconduct alleged. The existence of a city policy need be proven only by a preponderance of the evidence.[90]

The best evidence of an official policy would be a city ordinance or authorized police regulation approving the particular conduct.[91] If such proof does not exist, then the plaintiff can try to establish such a policy by implication. For example, the absence of any standards or checks governing police action may demonstrate the city's indifference to citizens' rights.[92] Although a city cannot insulate itself from liability merely by announcing that officers should not engage in misconduct, the city's silence, especially when coupled with other evidence indicating a perva-

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[88] *Id.* at 1137.

[89] *E.g.*, Conley v. Gibson, 355 U.S. 41, 47-48 (1957) (notice pleading under federal rules does not require detailed facts; discovery and pretrial procedures are the means for determining the basis of the claim). With regard to notice pleading in the context of § 1983 actions against municipalities, see Thompson v. Village of Evergreen Park, 503 F. Supp. 251, 252 (N.D. Ill. 1980) (Federal Rules of Civil Procedure do not require specific allegations in § 1983 actions); Thompson v. New York, 487 F. Supp. 212, 217 (N.D.N.Y. 1979) (lack of specific allegations of defendant's tortious conduct not fatal under liberal approach of Rule 8(f)); Edmonds v. Dillin, 485 F. Supp. 722, 728 (N.D. Ohio 1980) (same). In Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), *rev'd in part sub nom.* O'Shea v. Littleton, 414 U.S. 488, *vacated and remanded in part sub nom.* Spomer v. Littleton, 414 U.S. 514 (1974), defendants objected to a civil rights complaint because it did not contain "highly specific factual averments." The Seventh Circuit commented that the purpose of federal pleadings is to avoid the semantical donnybrooks inherent in differentiating what is evidence, ultimate facts and conclusions of law and fact . . . ." and that "dismissal should be sparingly used whenever it appears that a basis for federal jurisdiction in fact exists or may exist and can be stated by plaintiff." 468 F.2d at 394.

[90] *Cf.* Kerr v. City of Chicago, 424 F.2d 1134, 1139-40 (7th Cir.) (upholding jury instruction on this and other points), *cert. denied*, 400 U.S. 833 (1970).

[91] *Cf.* Monell v. Department of Social Servs., 436 U.S. 658, 690-91 (1978) (formal approval through the municipal policy-making process).

[92] *See* notes 68 through 75 and accompanying text *supra.*

sive pattern or practice of abuse, may evidence an official city policy that fosters police misconduct.[93]

The likelihood of recovery against a municipality increases if the misconduct is traced to someone high in the chain of command.[94] Thus, an effort should be made to identify all city officials who participated in the acts that caused the deprivation of rights. Similarly, evidence tending to show a high degree of autonomy on the part of these officers will be necessary. The greater the policy-making discretion of the official, the more likely it is that he will be found to have acted in an "official" capacity.[95] Although the best evidence of an official's authority is the city's own ordinances or regulations, his authority can also be shown from his employment agreement with the city, directions he has received from those in official positions, or longstanding practices.

Plaintiffs should discover whether the city has properly trained and supervised its officers.[96] It also would be advisable to discover whether municipal officers have been involved in similar incidents.[97] In this regard, police documents relating to citizens' complaints and internal investigations may be helpful in proving municipal culpability.[98] Official ratification of an officer's misconduct may also be shown by evidence either that the city relied on the fruits of its officer's misconduct to prosecute the plaintiff or that the manner of conducting investigations is designed to justify the misconduct.

Rizzo v. Goode[99] illustrates the difficulty of proving

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[93] *See* note 68 *supra*.

[94] *See* note 61 *supra*.

[95] *Id.*

[96] *See* note 69 *supra*.

[97] Evidence of similar incidents should be admissible at trial pursuant to FED. R. EVID. 404(b) and 406.

[98] *See* Moon v. Winfield, 368 F. Supp. 843, 845 (N.D. Ill. 1973) (police department documents used to show police superintendent's negligence in failing to act on brutality complaints); *cf.* Kerr v. United States Dist. Court, 511 F.2d 192, 196 (9th Cir. 1975) (prison board personnel files discoverable in suit attacking members' qualifications), *aff'd*, 426 U.S. 394 (1976).

[99] 423 U.S. 362 (1976). In *Rizzo*, plaintiffs offered evidence of the unconstitutional conduct of individual police officers. The police officers were not made parties to the action; rather, the defendants were the Mayor of Philadelphia and the police commissioner. The Court held that plaintiffs had failed to prove an "affirmative link between

supervisory responsibility where the evidence reveals only a number of unrelated incidents occurring in a large metropolitan area. Internal complaints and investigations may be helpful in establishing a pattern and practice.[100] Problems may be reduced if the plaintiff concentrates on proving only that an illegal official policy or practice exists in a particular neighborhood within a metropolitan area, or against a particular racial or ethnic group.[101] Prison and other institutional cases demonstrate that a pattern and practice can be proven by repeated incidents occurring in an institutional setting.[102] Also, proof may be facilitated if the plaintiff concentrates on one established police practice rather than on system-wide failures.[103]

The first cases brought against a particular municipality will require extensive discovery. Consequently, it may be worthwhile to establish a local clearinghouse procedure for sharing information secured in other cases. Even though each case will have its own particular problems of proof, such a procedure may never-

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the occurrence of the various incidents of police misconduct and the adoption of any plan by [defendants] showing their authorization or approval of such misconduct." *Id.* at 371.

[100] *See, e.g.*, Boyd v. Gullett, 64 F.R.D. 169, 177-78 (D. Md. 1974) (discovery of police investigative files permitted in civil rights case charging a systematic pattern of police brutality aimed at blacks); Frankenhauser v. Rizzo, 59 F.R.D. 339, 345-46 (E.D. Pa. 1973) (civil rights case against police officers and officials; court granted plaintiff's request to discover police department investigative files); Wood v. Breier, 54 F.R.D. 7, 9-10 (E.D. Wis. 1972) (plaintiffs in civil rights action entitled to discover police department investigative file).

[101] *See* Illinois Migrant Council v. Pilliod, 540 F.2d 1062, 1065-66 (7th Cir. 1976) (proof of individual instances of mistreatment of Mexicans by officials of the Immigration and Naturalization Service sufficient to support preliminary injunction), *aff'd and modified*, 548 F.2d 715 (7th Cir. 1977).

[102] *See, e.g.*, Dimarzo v. Cahill, 575 F.2d 15, 17-21 (1st Cir.) (unconstitutional prison conditions shown by evidence of inhumane living facilities and recreation procedure), *cert. denied*, 439 U.S. 927 (1978); Jackson v. Bishop, 404 F.2d 571, 572-80 (8th Cir. 1968) (evidence of prison's policy of whipping prisoners with strap established eighth amendment violation); Rogers v. Okin, 478 F. Supp. 1342, 1366-83 (D. Mass. 1979) (evidence of procedures for commitment, regulations concerning treatment, and medication practices sufficient to show state mental hospital violated patients' constitutional rights); Rennie v. Klein, 476 F. Supp. 1294, 1308-11 (D.N.J. 1979) (proof of procedure concerning patients' refusal of medication established violation of constitutional rights at state mental hospital).

[103] *See* Lyons v. City of Los Angeles, 615 F.2d 1243, 1245-50 (9th Cir.) (plaintiff attacked police practice of using strangleholds in non-life-threatening situations), *cert. denied*, 101 S. Ct. 333 (1980).

theless serve to expedite litigation.

VI. REMEDIES

Section 1983 provides that plaintiffs may sue for redress in either law or equity.[104] Thus, the possible remedies against police misconduct include injunctive relief, a declaratory judgment, or damages.

Because common law immunities do not apply to municipalities,[105] a victim of police misconduct almost certainly will want to sue the municipality for damages. Although the Supreme Court indicated that common law tort rules regarding damages apply in section 1983 actions,[106] it has also stated that rules governing compensation for injuries caused by the deprivation of constitutional rights should correspond to the particular constitutional interests in question.[107] Furthermore, the Court has indicated that the question of damages will be determined by federal standards as provided by 42 U.S.C. section 1988.[108] However, the Court has construed section 1988 to allow application of either damages rule in order to fulfill the policies of the federal statutes.[109]

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[104] See note 1 *supra*.

[105] Owen v. City of Independence, 445 U.S. at 638.

[106] Carey v. Piphus, 435 U.S. 247, 257-58 (1978). The Court addressed common law tort damages as a starting-point for inquiry into § 1983 damages. *Id.* at 257-58. *Piphus* involved two consolidated cases in which a customary 20-day suspension was enforced without a hearing, thereby denying petitioners' procedural due process rights. *Id.* at 249-50. The Court analogized tort interests to constitutional rights while simultaneously recognizing that some constitutional rights do not have analogous tort interests. *Id.* at 258.

[107] *Id.* at 258-59.

[108] *See id.* at 258 n.13 (§ 1988 authorizes courts to use common law of states where necessary to provide appropriate relief under § 1983); Baskin v. Parker, 588 F.2d 965, 970 (5th Cir. 1979) (damages for deprivation of a federally protected right are governed by federal standards under § 1988). 42 U.S.C. § 1988 (1976) provides:

> The jurisdiction in civil matters . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all causes where they are not adapted to the object, or are defined in the provisions necessary to furnish suitable remedies and punish, . . . the common law, as modified and changed by the constitutions and statutes of the state . . . so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . .

[109] Sullivan v. Little Hunting Park, 396 U.S. 229, 239-40 (1969) (awarding compen-

At the very least, a plaintiff who has suffered a constitutional deprivation is entitled to nominal damages.[110] Furthermore, he is entitled to any compensatory damages he can prove.[111] Thus, the plaintiff can be compensated for his illegal arrest,[112] illegal search,[113] unlawful confinement,[114] or for any pain, suffering or humiliation caused by the unconstitutional misconduct.[115] If he has been forced to expend money to defend himself in a court proceeding initiated by the local governmental entity, then he is entitled to recover those costs as well.[116]

Although the Supreme Court has left the question open, most lower federal courts have awarded punitive damages against public officials in appropriate cases.[117] The lower courts

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satory damages under § 1983 for racial discrimination by a community recreation corporation that excluded a black resident from park facilities).

[110] *See* Carey v. Piphus, 435 U.S. 247, 248 (1978) (nominal damages may be awarded for deprivation of procedural due process without proof of actual injury). The common law traditionally awarded nominal damages for deprivation of certain absolute rights without proof of actual injury. *Id.* at 266. The Court in *Piphus* reasoned that the right of procedural due process does not depend on the merits of substantive claims and is vital to organized society. *Id.* Since procedural due process is an absolute right the Court ruled that recovery of nominal damages for denial of procedural due process does not require proof of actual injury. *Id.*

[111] *Id.* at 266. However, the Court held that it will not presume substantial damages where a plaintiff has been denied his right to procedural due process. *Id.* at 262-63.

[112] *See, e.g.*, Basista v. Weir, 340 F.2d 74, 85-87 (3d Cir. 1965) (nominal, compensatory, and punitive damages available under § 1983 for arrest without provocation or warrant in private home); Rhoads v. Horvat, 270 F. Supp. 307, 311 (D. Colo. 1967) (actual and punitive damages available for warrantless arrest). These cases also indicate that a successful plaintiff may be compensated for medical expenses or loss of earnings occasioned by the illegal arrest. 340 F.2d at 84-85. The *Rhoads* court concluded that out-of-pocket losses should be determined by the jury. 270 F. Supp. at 310.

[113] Baskin v. Parker, 588 F.2d 965, 967 (5th Cir. 1979) (compensatory damages for illegal and unreasonable search without probable cause); Sexton v. Gibbs, 327 F. Supp. 134, 142 (N.D. Tex. 1970) (illegal search; nominal, compensatory and exemplary damages recoverable), *aff'd*, 446 F.2d 904 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972).

[114] Whirl v. Kern, 407 F.2d 781, 796-97 (5th Cir. 1968) (recovery for physical and mental injury as well as physical discomfort in jail during false imprisonment or unlawful detention), *cert. denied*, 396 U.S. 901 (1969).

[115] Carey v. Piphus, 435 U.S. 247, 264 (1978); Baskin v. Parker, 588 F.2d 965, 970 (5th Cir. 1979); Whirl v. Kern, 407 F.2d 781, 797 (5th Cir. 1968).

[116] Kerr v. City of Chicago, 424 F.2d 1134, 1141 (7th Cir. 1970) (in a § 1983 action for unlawful detention of a minor, funds expended by minor's parents for attorney's fees in criminal proceedings are recoverable).

[117] Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978). For a list of lower court opinions awarding punitive damages against public officials, see C. ANTIEAU, FEDERAL CIVIL

currently are divided on the question of whether punitive damages may be recovered from a municipality.[118] It can be argued that a prevailing plaintiff is made whole by an award of compensatory damages,[119] and that the imposition of exemplary damages will operate to punish the taxpayers rather than the corporate entity itself.[120] In many cases, however, the amount of compensatory damages recoverable will be minimal. Therefore, if a major goal of section 1983 is to deter unconstitutional conduct, punitive damages should be available against a municipality guilty of flagrant misconduct in its official capacity. At a minimum, punitive damages should be available against a municipality if they would be available under state law.[121] In addition to monetary relief, an order to expunge all records of an illegal arrest or seizure may be proper.[122]

Federal courts also have power to enjoin enforcement of an unconstitutional statute or ordinance.[123] However, concerns of comity and federalism may warrant a declaratory remedy in such cases because the latter remedy is less intrusive into state affairs than an injunction.[124] In any event, prospective relief may

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RIGHTS STATUTES § 212 n.21 (2d ed. 1980).

[118] *Compare* Simineo v. School Dist. No. 16, 594 F.2d 1353, 1357 (10th Cir. 1979) (public school teacher recovered punitive damages against school board for termination without procedural due process) *and* Cook v. City of Miami, 464 F. Supp. 737, 739 (S.D. Fla. 1979) (denial of motion to strike plaintiff's demand for punitive damages in § 1983 case) *with* Edmonds v. Dillin, 485 F. Supp. 722, 725, 730 (N.D. Ohio 1980) (municipality not liable for punitive damages in a civil rights action).

[119] Edmonds v. Dillin, 485 F. Supp. 722, 730 (N.D. Ohio 1980).

[120] *Id.*

[121] *See* Sullivan v. Little Hunting Park, 396 U.S. 229, 239-40 (1969) (both federal and state rules on damages are available to serve policies expressed in federal statutes).

[122] Sullivan v. Murphy, 478 F.2d 938, 958 (D.C. Cir.) (order to expunge records appropriate to preserve basic legal rights), *cert. denied*, 414 U.S. 880 (1973); Wilson v. Webster, 467 F.2d 1282, 1283-84 (9th Cir. 1972) (plaintiffs entitled to hearing on expungement of records to show impairment of fundamental rights by continued existence of records).

[123] *See* Wooley v. Maynard, 430 U.S. 705, 711-12 (1977) (injunctive relief preventing enforcement of unconstitutional statute appropriate in exceptional circumstances); Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (preliminary injunction may be granted to prevent enforcement of contested statute against plaintiff if enforcement would result in irreparable injury); Hague v. CIO, 307 U.S. 496, 518 (1939) (petitioners were entitled to injunction prohibiting enforcement of ordinance declared void).

[124] *See* Steffel v. Thompson, 415 U.S. 452, 460-73 (1974) (declaratory relief appropriate where injunctive relief not); Cicero v. Olgiati, 410 F. Supp. 1080, 1089-90

be made available whether the law is alleged to be unconstitutional on its face or merely as applied.[125]

Injunctive relief has also been granted to correct abuses of process such as warrantless searches of homes.[126] Similarly, in *Illinois Migrant Council v. Pilliod*,[127] the Court of Appeals for the Seventh Circuit affirmed the issuance of a preliminary injunction against agents and officials of the Immigration and Naturalization Service to prohibit them from detaining people solely on the basis of race and without probable cause to believe them to be aliens.[128]

The question of federal courts' power to issue injunctions to prevent police brutality was raised in *Rizzo v. Goode*.[129] The Supreme Court cautioned that equitable relief should not exceed the scope of the constitutional violation and that considerations of comity and federalism may limit the availability of broad mandatory injunctions against police departments.[130]

Rizzo, however, has not been interpreted to withdraw completely the power of federal courts to remedy police brutality by injunction. Thus, in *Lyons v. City of Los Angeles*,[131] the Court

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(S.D.N.Y. 1976) (judgment on validity of state administrative procedure permissible where no cases under the statute are pending).

[125] Steffel v. Thompson, 415 U.S. 452, 473-75 (1974). Once a prosecution is pending in state court, equitable considerations as well as considerations of comity and federalism will ordinarily prevent a federal court from interfering with the proceeding. *See, e.g.*, Hicks v. Miranda, 422 U.S. 332, 348-52 (1975) (district court erred in declaring statute unconstitutional while criminal prosecution was pending); Samuels v. Mackell, 401 U.S. 66, 73-74 (1971) (declaratory judgment improper when criminal prosecution pending); Younger v. Harris, 401 U.S. 37, 43-53 (1971) (injunctive relief by federal court improper while state criminal action in progress).

[126] Lankford v. Gelston, 364 F.2d 197, 201 (4th Cir. 1966). Police officers over a 19-day period had made more than 300 routine searches of homes without warrants or probable cause. *Id.* at 198. *See* Allee v. Medrano, 416 U.S. 802, 815 (1974) (if there is a persistent pattern of police misconduct injunctive relief is appropriate).

[127] 540 F.2d 1062 (7th Cir. 1976), *aff'd and modified*, 548 F.2d 715 (7th Cir. 1977). Plaintiffs produced evidence of repeated actions by I.N.S. officials in stopping members of the plaintiff class without legal cause and in conducting illegal searches of dwelling places and factories. The court held the evidence sufficient to prove a practice and policy of the I.N.S. 540 F.2d at 1065-66.

[128] 540 F.2d at 1072.

[129] 423 U.S. 362 (1976).

[130] *Id.* at 377-80.

[131] 615 F.2d 1243 (9th Cir.), *cert. denied*, 101 S. Ct. 333 (1980)(White, Powell, and Rehnquist, JJ., dissenting).

of Appeals for the Ninth Circuit held that a federal court could issue an injunction against the Los Angeles Police Department if the latter encouraged police officers to apply strangleholds to motorists stopped for minor traffic violations.[132] Unlike *Rizzo*[133] and *O'Shea v. Littleton*,[134] which sought massive structural relief, the Court of Appeals noted that Lyons merely sought to enjoin the use of an established police practice that violated the constitutional rights of himself and others.[135] The court concluded that such narrowly tailored relief would not involve the federal courts in supervising the day-to-day functioning of a police department.[136]

In addition to damages and equitable relief, section 1988 provides for attorney's fees to the prevailing party in a section 1983 action.[137] The amount of attorney's fees recoverable in individual cases may well equal or even exceed the value of any compensatory damages awarded to the plaintiff.[138] Therefore, the availability of attorney's fees should have a twofold effect: first, plaintiffs will have greater incentive to bring section 1983 suits and second, municipalities will have increased incentive to eliminate those conditions which may give rise to municipality liability.

VII. CONCLUSION

The availability of remedies against a municipality in police misconduct cases should result in increased protection for inno-

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[132] 615 F.2d at 1246-50.

[133] 423 U.S. at 365.

[134] 414 U.S. 488, 500, *vacated and remanded in part sub nom.* Spomer v. Littleton, 414 U.S. 514 (1974). The Supreme Court in *O'Shea* noted that the injunction requested would result in an "ongoing federal audit of state criminal proceedings. . . ." *Id.* at 500.

[135] 615 F.2d at 1247.

[136] *Id.*

[137] 42 U.S.C. § 1988 (1976). *See* Maine v. Thiboutot, 100 S. Ct. 2502, 2506-07 (1980) (attorney's fees recoverable in § 1983 action for statutory violation of federal law whether suit in federal or state court).

[138] *See* Donaldson v. O'Connor, 454 F. Supp. 311, 315 (N.D. Fla. 1978) (settlement does not limit award of attorney's fees under § 1988). *See generally* Comment, *Calculation of a Reasonable Award of Attorney's Fees Under the Attorney's Fees Awards Act of 1976*, 13 J. MAR. L. REV. 331 (1980) (examination of factors used by courts to calculate attorney's fees awarded under § 1988).

cent victims. Once an official policy is established by the evidence, responsibility can be placed upon a single entity.

In addition, naming a municipality as a defendant may well be wise strategy. Previously, if a police officer was sued for misconduct, the city automatically rushed to his defense claiming he acted in good faith and the plaintiff's injury, if any, was the result of systemic failures for which no one was legally answerable. As a result of *Monell* and *Owen*, the officer and the city may actually become enemies. The officer will argue that his actions were reasonable and done in good faith. The city will deny that a policy authorizing or condoning police misconduct exists. All of these factors should motivate municipalities both to eliminate conditions which foster police misconduct and to deal swiftly and efficiently with those officers who violate the rules. This appears to be precisely the result the Supreme Court in *Owen* sought to achieve.

*Editor's note: As we go to press, it is essential to note that in City of Newport the Fact Concerts, Inc., 49 U.S.L.W. 4860 (June 23, 1981), the United States Supreme Court held municipalities are immune from punitive damages under 1983.

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COMMENTS

DIAMOND IN THE ROUGH: LOCAL LIABILITY FOR UNCONSTITUTIONAL CONDITIONS IN COUNTY JAILS—AN ANALYSIS OF JONES V. DIAMOND

I. INTRODUCTION

A. *Federal Intervention in State Prisons*—Gates v. Collier

In 1971 Nazareth Gates[1] filed a class action[2] in the Federal District Court for the Northern District of Mississippi attacking the unconstitutional conditions and practices at the legendary "Parchman Farm."[3] The result of this suit was the declaration by United States District Court Judge William C. Keady that

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[1] Nazareth Gates was a young black male prisoner at Parchman at the time the suit was filed. In view of his age, sex and race, Mr. Gates was representative of the typical Mississippi prisoner. Gates v. Collier, 349 F. Supp. 881, 886 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974) (of the 1900 inmates in Parchman in 1972, 50 were women and two-thirds of the total prison population was black); Clarion-Ledger Jackson Daily News, Dec. 31, 1979, at 3, col. 1 (typical Mississippi prisoner is a black male in his twenties).

[2] The suit was filed on behalf of two overlapping classes of plaintiffs. One class consisted of all inmates claiming deprivation of a broad range of rights. The second class consisted of all black inmates claiming racial discrimination and segregation in addition to the allegations asserted by the first class. 349 F. Supp. at 885 n.1 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974). Nazareth Gates was frequently the representative of classes of inmates seeking relief from the conditions of the Mississippi State Penitentiary at Parchman. *See* Gates v. Collier, 559 F.2d 241 (5th Cir. 1977) (determination of award of attorneys fees); Gates v. Collier, 548 F.2d 1241 (5th Cir. 1977) (temporary restraining order closing camps and ensuring minimum living space for prisoners upheld); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) (practices and conditions at Parchman held to be unconstitutional); Gates v. Collier, 407 F. Supp. 1117 (N.D. Miss. 1975) (motion to accelerate compliance with timetable was denied); Gates v. Collier, 390 F. Supp. 482 (N.D. Miss. 1975) (submission of comprehensive plan for compliance with guidelines required).

[3] Gates v. Collier, 349 F. Supp. 881, 881-82 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974). The named defendants were penitentiary superintendent Thomas D. Cook, the members of the Mississippi Penitentiary Board and Mississippi Governor William L. Waller. John Collier replaced Thomas D. Cook as superintendent in February 1972, and was substituted as a defendant. 349 F. Supp. at 885.

Parchman was "unfit for human habitation,"[4] signaling the beginning of federal intervention in the traditionally local matter of state prison administration.[5] Over the next nine years, Judge

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[4] 349 F. Supp. at 894.

[5] Traditionally, a federal court would not inquire into the internal operations of state penitentiaries in the absence of exceptional circumstances. Sinclair v. Henderson, 435 F.2d 125, 126 (5th Cir. 1970) (federal courts are reluctant to interfere with the internal operations of prisons but will entertain allegations of extreme mistreatment of prisoners). *See* Haines v. Kerner, 404 U.S. 519, 520 (1972) (pro se complaint held to withstand a Rule 12(b)(6) challenge regardless of any limitations upon the scope of inquiry into the internal administration of prisons). Judge Kaufman, writing for the majority in Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971)(en banc), *cert. denied,* 405 U.S. 978 (1972), embraced the traditional view when he stated:

> We do not doubt the magnitude of the task ahead before our correctional systems become acceptable and effective from a correctional, social and humane viewpoint, but the proper tools for the job do not lie with a remote federal court. The sensitivity to local nuance, opportunity for daily perseverance, and the human and monetary resources required lie rather with legislators, executives, and citizens in their communities.

442 F.2d at 205 (officials enjoined from imposing solitary confinement because of prisoner's political beliefs and involvement in lawful activities). *See generally* Remington, *State Prisoner Litigation and the Federal Courts,* 1974 ARIZ. ST. L.J. 549, 549 (federal courts followed a "hands-off" doctrine by refusing to become involved in state correctional practices, "leaving decision making to those most knowledgeable about the needs of the correctional system"); Comment, *Cruel But Not So Unusual Punishment: The Role of the Federal Judiciary in State Prison Reform,* 7 CUM. L. REV. 31, 32 (1976) (federal courts' "hands-off" philosophy concerning the rights of prisoners was based in part upon the view that each state should control the internal management of its prisons).

The initial *Gates* suit was the first case in the Fifth Circuit in which a federal court intervened on a broad scale in the internal affairs of a state prison. Judge Tuttle had indicated in an earlier dissenting opinion that federal courts should intervene substantially in the unconstitutional practices of state prisons. Novak v. Beto, 453 F.2d 661, 672 (5th Cir. 1971) (Tuttle, J., concurring in part and dissenting in part) (federal review of state prison confinement practices under the eighth amendment's test of "cruel and unusual punishment" cannot rely upon corrective action to be taken by the state legislative and administrative branches), *cert. denied,* 409 U.S. 968 (1972). *See also* Hutchens v. Alabama, 466 F.2d 507, 508 (5th Cir. 1972) (per curiam) (complaint by prisoner alleging lack of medical attention stated a claim for relief); Campbell v. Beto, 460 F.2d 765, 768 (5th Cir. 1972) ("courts cannot close their judicial eyes to prison conditions which present a grave and immediate threat to health or physical well being"); Rocha v. Sowers, 454 F.2d 1155, 1156 (5th Cir. 1972) (per curiam) (complaint by prisoner alleging denial of adequate medical treatment stated a claim under the civil rights acts).

The United States Supreme Court addressed the issue of federal court intervention in state prison affairs in the same year the initial *Gates* suit was decided by the district court. *See* Cruz v. Beto, 405 U.S. 319, 321 (1972) (per curiam) ("federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons' which include prisoners").

Keady issued a series of mandates setting minimum constitutional standards. Among other things, the court ordered that each state prisoner be allotted a minimum of fifty square feet of living space,[6] thus reducing the available living space by closing unconstitutional housing units.[7] In 1975 Judge Keady closed Parchman to incoming inmates until the state could provide adequate space for the existing prison population.[8] The burden of housing state prisoners was thus shifted to Mississippi's county jails.[9]

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[6] Gates v. Collier, 407 F. Supp. 1117, 1123 (N.D. Miss. 1975).

[7] In the 1972 opinion of Gates v. Collier, 349 F. Supp. 881, 887-88 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974), the district court found many of the housing units at Parchman to be deplorable. In 1975, the court ordered that six camps be closed. Gates v. Collier, 407 F. Supp. 1117, 1122 (N.D. Miss. 1975). On February 3, 1975, the defendants were ordered to establish a timetable for the elimination of those camps found unfit for human habitation. Gates v. Collier, 423 F. Supp. 732, 739-40 (N.D. Miss. 1976), *aff'd*, 548 F.2d 1241 (5th Cir. 1977). After consideration of the defendants' plan and in light of the court's finding that unconstitutional conditions still existed at Parchman, the court established the following schedule for the elimination of those camps determined to be unfit for human habitation: two camps were to be closed by July 7, 1976; two camps were to be closed by January 1, 1977; and two more camps were ordered closed by July 1, 1977. 423 F. Supp. at 738-39.

[8] Gates v. Collier, 407 F. Supp. 1117, 1123 (N.D. Miss. 1975). The defendants claimed that they were unable to comply with the court's order closing Parchman to new inmates because of the enactment of the Mississippi Corrections Act of 1976 § 12(a), *codified at* MISS. CODE ANN. § 47-5-10(a) (Supp. 1979) (to be repealed effective July 1, 1981). Gates v. Collier, 423 F. Supp. 732, 743 (N.D. Miss. 1976), *aff'd*, 548 F.2d 1241 (5th Cir. 1977). That section of the Act made it the duty of the Department of Corrections "[t]o accept adult offenders committed to it by the courts of this state for incarceration, care, custody, treatment and rehabilitation." MISS. CODE ANN. § 47-5-10(a) (Supp. 1979). Two other state law provisions presented potential impediments to the defendant's compliance with the court's depopulation order. One statute prevented an inmate from being sent to a county pursuant to the state's work release program over the objection of that county's sheriff, circuit judge, or district attorney. 423 F. Supp. at 743 (citing MISS. CODE ANN. § 47-5-165 (Supp. 1979) (to be repealed effective July 1, 1981)). The second statute prohibited the placing of any state offender in a county jail without the prior consent of the local jail authority and the Department of Corrections' certification to the lack of space. 423 F. Supp. at 743-44 (citing MISS. CODE ANN. § 47-5-159 (Supp. 1979) (to be repealed effective July 1, 1981)). The court issued a temporary restraining order enjoining enforcement of the state law on the basis of its finding of constitutionally impermissible conditions at Parchman. 423 F. Supp. at 744.

[9] In order to comply with the court order requiring 50 square feet per inmate, the defendants were faced with two alternatives: (1) the expansion of housing facilities, or (2) the reduction of inmate population. Efforts to reduce prisoner population through work release and early release programs proved futile. Gates v. Collier, 423 F. Supp. 732, 736 (N.D. Miss. 1976), *aff'd*, 548 F.2d 1241 (5th Cir. 1977).

Today, most state prisoners at Parchman enjoy clean, well-lighted dormitories, well-balanced meals, a variety of recreational and educational programs,[10] reasonable access to a law library and inmate writ-writers,[11] and an adequate medical staff,[12]

In attempting to rectify the unconstitutional conditions at Parchman, the legislature adopted a proposal that specified long range and immediate objectives for improving the state penitentiary. *See* 1973 Miss. Laws ch. 440, § 20, *as amended by* 1974 Miss. Laws ch. 528, § 1 (codified at MISS. CODE ANN. § 47-5-5 (Supp. 1979)). The cost estimates of Phase I projects designed to provide more modern and efficient penal facilities were as follows:

(1)	Training Facilities	$45,000.00
(2)	Classification and Filing	$55,000.00
(3)	Camp Renovation	$250,000.00
(4)	Security Building	$125,000.00
(5)	Construction of a first offenders camp	$700,000.00
(6)	Complete renovation and additional construction to penitentiary hospital at present location	$500,000.00
(7)	Central food and service facility to be constructed in connection with central complex	$350,000.00
(8)	Security Fencing	$100,000.00
(9)	One (1) maximum security unit	$875,000.00
Total Expenditure for Implementation of Phase I		$3,000,000.00

MISS. CODE ANN. § 47-5-5 (Supp. 1979).

[10] *See, e.g.*, Gates v. Collier, 390 F. Supp. 482, 485 (N.D. Miss. 1975) (court noted the improved conditions at Parchman), *aff'd*, 525 F.2d 965 (5th Cir. 1976).

[11] Pursuant to a consent order entered by the court, a comprehensive library of criminal law materials, including federal and Mississippi cases, digests, encyclopedias, textbooks and treatises featuring criminal jurisprudence was established at Parchman. Stevenson v. Reed, 391 F. Supp. 1375, 1377 n.2 (N.D. Miss. 1975), *aff'd*, 530 F.2d 1207 (5th Cir.), *cert. denied*, 429 U.S. 944 (1976).

[12] Gates v. Collier, 407 F. Supp. 1117, 1118, 1121 (N.D. Miss. 1975). In July 1980, the medical staff at Parchman moved into the new $4 million medical/dental facility, which houses 56 beds, including 14 psychiatric beds, 18 female medical beds, and 24 male medical beds. The medical facility at Parchman provides the following services: on-site basic general practice and psychiatric medical care by staff (full-time) and basic dental care by staff (full-time); on-site contractual specialists (part-time) including ophthalmologists, optometrists, and radiologists; minor surgery by staff; consulting specialists available at the University Medical Center in all fields. Also, the plan is to include additional consulting specialists on a part-time contractual basis as they become available in the geographical area. The complex is staffed with four full-time doctors including one psychiatrist, two dentists, one full-time registered pharmacist, one part-time registered pharmacist, nine licensed practical nurses, seven registered nurses, including an emergency room nurse/supervisor and a psychiatric nurse, six licensed emergency medical technicians, one certified laboratory technologist, and one certified X-ray technologist. Finally, one of the doctors is licensed to practice in Mississippi, two doctors institutionally licensed, and the psychiatrist is institutionally licensed to practice. Letter from

all administered by the Mississippi Department of Corrections.[13] As of December 1979, however, there were 998 state prisoners housed in county jails waiting for space to become available at Parchman.[14] Paradoxically, while these inmates wait in county jails to ensure the constitutionally minimum standards required by *Gates v. Collier*, the conditions in county jails are frequently worse than those for which the *Gates* decision provided a remedy.[15] For example, only 6.5 percent of Mississippi's local jails have recreational programs;[16] visitation rights are arbitrarily withheld as punishment;[17] and meals may be inadequate and unpalatable.[18] Other allegations from county prisoners of unconsti-

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Rebecca L. Jones, MSW Hospital Administrator (June 18, 1980) (on file with the *Mississippi Law Journal*).

[13] The Mississippi Department of Corrections is under the policy direction of the Mississippi Board of Corrections. MISS. CODE ANN. § 47-5-8(1) (Supp. 1979) (to be repealed effective July 1, 1981). *Id.* § 47-5-10 (Supp. 1979) enumerates the powers and duties of the Department of Corrections. The Board of Corrections is composed of seven members appointed by the Governor. At least one attorney and one physician must be appointed to the board. *Id.* § 47-5-12 (Supp. 1979) (to be repealed effective July 1, 1981).

[14] Clarion-Ledger Jackson Daily News, Dec. 31, 1979, at D-2, col. 2. State Department of Corrections' records reveal that during the past 21 months there have been as many as 1,175 and as few as 715 state prisoners housed in county jails. The average for this period was 922. *Id.*

[15] *See* Taft, *Backed Up In Jail: County Lockups Overflow as Courts Clamp Down on State Prisons*, CORRECTIONS, June, 1979, at 27 ("prisoners sentenced to long terms are spending months and even years in local jails that are barely fit to spend the night in, because there is no room in long-term institutions"). Corrections Commissioner Watkins has indicated that the backlog of state inmates in county jails awaiting transfer to Parchman will continue to exist until at least 1982, when newer facilities are scheduled to be completed at the penitentiary. Clarion-Ledger Jackson Daily News, Dec. 31, 1979, at D-2, D-3, col. 1.

[16] Clarion-Ledger Jackson Daily News, Dec. 31, 1979, at D-2, col. 2; *cf.* Gates v. Collier, 390 F. Supp. 482, 485 (N.D. Miss. 1975) (inmates at Parchman are provided with "an adequate recreation program"), *aff'd*, 525 F.2d 965 (5th Cir. 1976).

[17] *See* Valentine v. Englehardt, 474 F. Supp. 294, 295 (D.N.J. 1979) (county jail regulations barring visitation of inmates by their children are unconstitutional); Mitchell v. Untreiner, 421 F. Supp. 886, 891 (N.D. Fla. 1976) (severely restrictive visitation procedures subject to the determination of jail personnel without written guidelines was a factor in determination of county jail's practices as violative of prisoners' constitutional rights). By contrast, the policies of the state prison facility at Parchman not only allow children to visit incarcerated parents every other week, but also permit conjugal visitation by the inmates' spouses. Gettinger, *Mississippi Has Come a Long Way, But it had a Long Way to Come*, CORRECTIONS, June, 1979, at 18.

[18] Clarion-Ledger Jackson Daily News, Dec. 31, 1979, at D-2, col. 2. A daily allowance of 2,700 calories is recommended for the average male between 23 and 50. A mature

tutional treatment range from head-shaving[19] to denial of medical treatment resulting in death.[20] Furthermore, presumptively innocent people awaiting trial are frequently crowded with convicted felons awaiting transfer to Parchman.[21]

B. Recommended County Standards

To date, over thirty county jails in Mississippi are the sub-

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man who sits or stands for 12 hours and lies down for 12 hours a day consumes at least 2000 calories per day. NATIONAL ACADEMY OF SCIENCES, RECOMMENDED DIETARY ALLOWANCES app., at 27 (8th rev. ed. 1974).

Although the state requires that prisoners in county jails be fed, there are no regulations as to the quality of the food or the number of calories. MISS. CODE ANN. § 47-1-47 (Supp. 1979) ("every convict shall be sufficiently fed, to maintain his body and induce his good health, with substantial and suitable food . . . ."). A $5.00 per day total expenditure is statutorily allocated for "food and related supplies" for each county prisoner. *Id.* § 19-23-73 (Supp. 1979). All contracts for the purchase of materials, supplies, equipment, and sustenance of offenders of the correctional system must be made under the provisions of the state purchasing law. *Id.* §§ 31-7-1 to -129 (1972 & Supp. 1979).

[19] Carter v. Noble, 526 F.2d 677, 678 (5th Cir. 1976) (Madison County jailer who shaved the head of an inmate to be released the next day held liable under § 1983). *But cf.* Williams v. Hoyt, 556 F.2d 1336, 1338-39 (5th Cir. 1977) (head-shaving by county jail officials for sanitary reasons after determining prisoner had "filthy and insect-infested" hair held not violative of § 1983), *cert. denied*, 435 U.S. 946 (1978).

[20] Farmer v. State, 224 Miss. 96, 106, 79 So. 2d 528, 531 (1955) (sheriff held liable for death of man in his custody due to lack of medical attention and proper diet). By statute, a sheriff owes a duty of reasonable care to his prisoners to call a physician or a surgeon if he thinks that the prisoner is in need of medical attention. If the inmate is unable to assume the cost of his medical treatment, the county is empowered to pay the physician up to $5.00 for each visit. MISS. CODE ANN. § 47-1-57 (1972). *See* Mississippi v. Durham, 444 F.2d 152, 157 (5th Cir. 1971) ("sheriff cannot escape his responsibility to take reasonable care of prisoners in his custody by simply making a casual examination of one who obviously needs medical attention, then declaring . . . that he did not need such aid"); MISS. CODE ANN. § 47-1-59 (1972) (sheriff is authorized to take a prisoner requiring medical attention to the nearest hospital in the county for treatment by a physician).

[21] *See* Bell v. Wolfish, 441 U.S. 520, 524 (1979) (pretrial detainees and convicted inmates were housed in the federal Metropolitan Correction Center in New York City); Jones v. Diamond, 594 F.2d 997, 1006 (5th Cir.) (57 of the 74 prisoners confined at the Jackson County Jail on June 20, 1977, would have been confined at Parchman except for the unconstitutional conditions of the penitentiary), *rehearing granted*, 602 F.2d 1243 (5th Cir. 1979) (en banc); Carter v. Noble, 526 F.2d 677, 678 (5th Cir. 1976) (per curiam) (traffic offender retained in Madison County, Mississippi, jail for nonpayment of fees incurred that day); Cole v. Tuttle, 366 F. Supp. 1252, 1253 (N.D. Miss. 1973) (defendant in state criminal proceeding incarcerated in Panola County Jail prior to trial on the merits because of his inability to make bond).

ject of litigation concerning their operations and regulations.[22] In January of 1980 the Center for Governmental Technology at Mississippi State University developed an extensive checklist to assist local and county officials in determining their vulnerability to potential lawsuits.[23] The manual encourages officials to: (1) have regular inspections by the fire and health departments to ensure compliance with various safety regulations; (2) dispose of all flammable mattresses, pillows and upholstery padding; (3) segregate by sex, age and seriousness of the crime; (4) separate pretrial detainees from convicted felons; (5) have adequate garbage disposal systems; and (6) inspect regularly for rodents and pests.[24] The handbook also suggests that menus be approved by a dietitian and that special diets be provided for medical or religious reasons.[25] To reduce unsanitary living conditions, jail officials are directed to: (1) supply basic hygenic items; (2) issue clean clothes daily or offer inmates an opportunity to launder their own; (3) provide clean towels three times a week and access to bath facilities daily; and (4) sanitize mattresses frequently.[26] The manual places special emphasis upon adequate medical care and attention.[27] Jail officials should have written agreements with physicians and hospitals for constant availability of medical treatment.[28] Moreover, every inmate should be given a physical examination shortly after admission.[29] The manual also includes detailed disciplinary rules and procedures in addition to model

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[22] Clarion-Ledger Jackson Daily News, Dec. 31, 1979, at 24, col. 2.

[23] CENTER FOR GOVERNMENTAL TECHNOLOGY: MISSISSIPPI STATE UNIVERSITY COOPERATIVE EXTENSION SERVICE, PUB. AD. SER., No. 9, JAIL OPERATIONS: A GUIDE FOR COUNTY AND MUNICIPAL GOVERNMENTS 2 (1980) [hereinafter cited as JAIL OPERATIONS]. The suggested preventive measures reflect federal and state court decisions. *Id.*

[24] *Id.* at 3; *see* MISS. CODE ANN. § 19-25-71 (1972) (sheriff is to separate prisoners by sex in county jails).

[25] JAIL OPERATIONS, *supra* note 23, at 4.

[26] *Id.*

[27] *Id.* at 4, 15.

[28] *Id.* at 4; *see* MISS. CODE ANN. § 47-1-57 (1972) (county officials may enter into yearly contracts with a physician to provide medical services for inmates).

[29] JAIL OPERATIONS, *supra* note 23, at 4. In addition to providing physical examinations of inmates, information should be obtained from each prisoner to facilitate emergency care. Daily sick-call should be conducted and requests by inmates for medical attention should never be ignored. *Id.* at 4, 15.

mail regulations, law library access procedures[30] and a suggested classification system.[31] Although compliance with this checklist cannot guarantee immunity from suit, these measures should be implemented voluntarily in recognition of the rights retained by prisoners.

C. *Federal Intervention in Local Jails*—Jones v. Diamond

Traditionally, county jails have been considered a purely local matter. State law prescribes only general guidelines, investing local officials with vast discretion in day-to-day administration.[32] Courts have been reluctant to intervene in jail administration[33]—the same approach taken with state prisons—until recently.[34] Despite the courts' "hands off" attitude, both prisoners[35] and prison officials[36] advocate applying the *Gates* stan-

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[30] *Id.* at 18-26.

[31] *Id.* at 5.

[32] *See* MISS. CODE ANN. § 19-25-69 (1972) (sheriff is empowered to maintain the county jail "in a clean and comfortable condition"); *id.* § 19-25-71 (sheriff shall provide all prisoners with "daily wholesome and sufficient food and drink, fire and lights when necessary and proper, and sufficient and clean bedding . . ."); *cf. id.* § 47-1-51 (jailer of facility jointly owned by a county and a municipality also required to provide for prisoners). For an analysis of the sheriff's duty to provide medical treatment for inmates, see note 20 *supra*.

[33] *See, e.g.*, Dailey v. Byrnes, 605 F.2d 858, 862 (5th Cir. 1979) (inmates challenging conditions of confinement at a county jail in Alabama were denied relief); McMahon v. Beard, 583 F.2d 172, 173-74 (5th Cir. 1978) (pretrial detainee was denied relief after being confined to "strip cell" and denied medical attention following a suicide attempt); Cole v. Tuttle, 366 F. Supp. 1252, 1253-55 (N.D. Miss. 1973) (county inmates denied relief from unsanitary and unsafe conditions in Panola County Jail); *cf.* Jones v. Diamond, 594 F.2d 997, 1029-30 (5th Cir.) (inmates suing Jackson County Jail for unconstitutional conditions of confinement denied damage claim but granted injunctive relief), *rehearing granted*, 602 F.2d 1243 (5th Cir. 1979) (en banc); Patterson v. Hopkins, 481 F.2d 640, 640 (5th Cir. 1973) (per curiam) (juveniles in Coahoma County Jail granted declaratory relief from conditions but denied request for damages). *But see* Mississippi v. Durham, 444 F.2d 152, 157 (5th Cir. 1971) (sheriff cannot avoid responsibility of taking reasonable care of prisoners in his custody by casually examining one obviously in need of medical attention); Alberti v. Sheriff of Harris County, 406 F. Supp. 649, 669 (S.D. Tex. 1975) (sweeping reform of jail conditions in Texas granted); Farmer v. State, 224 Miss. 96, 105, 79 So. 2d 528, 529-31 (1955) (sheriff liable for abuse of discretion resulting in death of inmate).

[34] *See* note 5 *supra*.

[35] *See* Clarion-Ledger Jackson Daily News, Dec. 31, 1979, at 3, col. 2 (two state prisoners confined in jail in Adams County, Mississippi, attempted suicide by hanging in protest of intolerable conditions).

[36] *See id.*

dards to county jails.

In 1973 Marvin Jones filed a class action in the Federal District Court for the Southern District of Mississippi on behalf of all past, present, and future inmates incarcerated at the Jackson County Jail in Pascagoula, Mississippi.[37] The complaint, pursuant to section 1983,[38] sought injunctive relief for comprehensive reform of conditions, programs and practices existing at the "old" jail, and sought damages for constitutional violations occurring when the plaintiff and his class were detained there.[39] The named defendants were the sheriff, his agents and employees, trusties serving at the jail since January, 1972, and the Jackson County Board of Supervisors.[40] The prisoners alleged that the defendants had failed to provide recreational programs, adequate living space, medical care, reasonable visitation privileges, integrated accommodations, clearly cognizable rules, and separation of convicted persons from pretrial detainees.[41]

Responding to Jones' requests, District Judge Harold Cox entered an order denying the request for class action certification and dismissed the board of supervisors as defendants.[42] Jones appealed the order and the Fifth Circuit reversed and remanded.[43] Following the trial on the merits, Judge Cox rendered

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[37] Jones v. Diamond, 519 F.2d 1090, 1093-94 (5th Cir. 1975). The class consisted of at least 8,580 persons. Jones v. Diamond, 594 F.2d 997, 1009 (5th Cir.), *rehearing granted*, 602 F.2d 1243 (5th Cir. 1979) (en banc).

[38] 42 U.S.C. § 1983 (Supp. III 1979). For the text of § 1983, see note 167 *infra*.

[39] 519 F.2d at 1093.

[40] *Id.* at 1094.

[41] *Id.* at 1093 n.2.

[42] *Id.* at 1097, 1100. Apparently, Judge Cox's reasons for refusing to certify the class were: (1) Jones pled conclusions rather than the facts supporting the proposition; (2) failure to meet the jurisdictional amount; (3) mootness; and (4) failure to meet the numerosity requirement of FED. R. CIV. P. 23(a)(1).

[43] 519 F.2d at 1102. Overturning Judge Cox's order, the Fifth Circuit held that: (1) a trial court cannot deny certification of a class solely on the basis of initial pleadings; (2) 28 U.S.C. §§ 1331, 1343(a)(3) (Supp. III 1979) do not require a jurisdictional amount; (3) this is a situation "capable of repetition, yet evading review;" and (4) the numerosity requirement in civil rights cases is to be considered liberally, especially where the plaintiff is seeking injunctive relief for future class members. 519 F.2d at 1097-1100. As to the dismissal of the board of supervisors, the court concluded that the trial court could not dismiss the defendants before a hearing was held to determine whether or not they had acted in good faith. After Owen v. City of Independence, 445 U.S. 622 (1980), political

an opinion denying injunctive and monetary relief to the named plaintiff without making a decision as to the class.[44] Instead of appealing the judgment, Jones requested the Fifth Circuit to issue a writ of mandamus compelling Judge Cox to consider the class issue. After the court issued the writ, Judge Cox responded by denying most of the relief the class had requested.[45] Both the named plaintiff and the class then filed motions for leave to appeal in forma pauperis.[46] The class was granted leave to appeal in forma pauperis but Jones' motion was denied.[47]

On appeal, Fifth Circuit Judges Coleman and Clark concluded that Jones was barred from appealing his individual claims since he had not filed a timely appeal regarding the denial of his individual claims. However, the court held that Jones was still an adequate representative of the class.[48] Furthermore, the court affirmed the denial of damages, concluding that there was no proof of deliberate or callous indifference on the defendants' part.[49] The court also affirmed the district court's denial of the class' request for sweeping injunctive relief, finding that the jail conditions were not unfit for human habitation.[50] On the other hand, the court reversed the district court's other findings and remanded the case for an order prohibiting segregation, prescribing rules regulating the number of inmates to be housed, classifying prisoners, and detailing jail officials' duties.[51]

At oral argument the appellants urged the panel to recon-

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subdivisions can no longer assert as a defense the good faith of their officials. *See* notes 189 through 194 and accompanying text *infra*.

[44] Jones v. Diamond, 594 F.2d 997, 1004-05 (5th Cir.), *rehearing granted*, 602 F.2d 1243 (5th Cir. 1979) (en banc).

[45] 594 F.2d at 1005.

[46] *Id.*; *see* FED. R. APP. P. 24.

[47] 594 F.2d at 1005.

[48] *Id.* at 1022. The court noted that the district court's order adjudicating Jones' individual rights was final and appealable. Since Jones did not take a timely appeal from this order, he was barred from appealing his individual claims. *Id.* at 1005 n.2. Although Jones' individual claims had been dismissed, the court held that he could adequately represent the class since he was still a member of the class and retained the same interests of the class. *Id.* at 1005; *see* Sosna v. Iowa, 419 U.S. 393, 403 n.13 (1975) (named plaintiff can continue to represent a class if he or she retains the interests of the class).

[49] 594 F.2d at 1022.

[50] *Id.* at 1017-18.

[51] *Id.* at 1011-20.

sider the case in light of the recent Supreme Court decision in *Bell v. Wolfish*,[52] where the Court stated that the constitutionality of conditions or restrictions imposed upon pretrial detainees should be analyzed under the fourteenth amendment rather than the eighth amendment. According to the Court, the proper inquiry should be whether the pretrial detainee has been *punished* without due process of the law.[53] Although the panel recognized that the due process clause, rather than the eighth amendment, was applicable to pretrial detainees,[54] the court appears to have applied the cruel and unusual punishment standard throughout.[55] Thus, the panel essentially substituted a general constitutional standard for an issue otherwise resolved by the weight of proof: whether prison officials acted with deliberate and callous indifference. Indeed, as Judge Rubin pointed out in his concurring and dissenting opinion, the majority "failed to distinguish between the *nature of the conduct* that must be shown to establish a violation of constitutional rights and whether, if such a violation is shown, the *degree of culpability* justifies the imposition of damages under section 1983."[56]

Jones has been reheard en banc by the Fifth Circuit and a decision is now pending. The case gained circuit-wide attention because a majority of one panel of this large circuit utilized a case dealing with one county jail in Mississippi to write an extensive opinion delineating general standards that could be used as a guide throughout the circuit. Thus, *Jones* is the potential vehicle for applying federal standards to county jails.[57]

When local authorities and voters refuse to upgrade jail conditions voluntarily,[58] the courts have a duty to protect and

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[52] 441 U.S. 520 (1979).

[53] *Id.* at 535 (emphasis added). For a discussion of what the Court considers punishment, see notes 293 through 296 and accompanying text *infra*.

[54] 594 F.2d at 1003.

[55] *See id.* at 1019.

[56] *Id.* at 1035 (emphasis added).

[57] United States Fifth Circuit Judge J.P. Coleman authored the majority opinion which granted the plaintiffs injunctive relief only against future overcrowding of the Jackson County, Mississippi, Jail. *Id.* at 1003, 1022. Judge Alvin Rubin wrote a strong dissent to the court's decision. *Id.* at 1031-39.

[58] In 1979, Harrison and Oktibbeha counties rejected proposals for bond issues appropriating funds for new jails. Clarion-Ledger Jackson Daily News, Dec. 31, 1979, at

enforce prisoners' constitutional rights.[59] Nevertheless, bridging the gap between fulfillment of this obligation and a comprehensive judicial reform of county jails is not without serious problems.

II. Attorney-Client Access

In the continuing effort to delineate the constitutional rights of prisoners, one of the areas closely scrutinized by the courts has been that of attorney-client access. Court decisions reflect "especial vigilance" in efforts to protect inmates' access to the courts.[60] In 1972, Judge Keady in *Gates*[61] stated that any prison-imposed restrictions on attorney-client access must be both reasonably and necessarily required for the advancement of some justifiable purpose related to incarceration.[62] Yet, prison officials do not have to "adopt every proposal that may be thought to facilitate prisoner access to the courts."[63] Reasonable

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2, col. 3.

[59] Cruz v. Beto, 405 U.S. 319, 321 (1972) (per curiam) ("Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons' including prisoners.").

[60] *See, e.g.*, Bounds v. Smith, 430 U.S. 817, 828 (1977) (prison authorities required to provide inmates with adequate law libraries or legal assistance); Johnson v. Avery, 393 U.S. 483, 490 (1969) (prison regulation barring inmates from assisting fellow inmates invalidated); Roberts v. La Valle, 389 U.S. 40, 42 (1967) (indigent pretrial inmates have a right to transcript of preliminary hearing at state expense; financial inability does not preclude access to the courts); Douglas v. California, 372 U.S. 353, 356-58 (1963) (counsel must be appointed to inmate for first appeal from conviction); Smith v. Bennett, 365 U.S. 708, 713 (1961) (state regulation requiring indigent inmates to pay filing fee for habeas corpus petitions and trial transcripts invalidated); Burns v. Ohio, 360 U.S. 252, 258 (1959) (convicted indigent prisoner not required to pay docket fee prior to filing notice of appeal of petition for habeas corpus); Griffin v. Illinois, 351 U.S. 12, 20 (1956) (state required to provide trial records to indigent inmates); *Ex parte* Hall, 312 U.S. 546, 549 (1941) (right of convicted offender to access to courts guaranteed by the fourteenth amendment); Gilmore v. Lynch, 319 F. Supp. 105, 112 (N.D. Cal. 1970) (three-judge court) (state officials must furnish inmates with reasonable law library), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 14 (1971) (per curiam).

[61] 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974).

[62] 349 F. Supp. at 896.

[63] Procunier v. Martinez, 416 U.S. 396, 420 (1974) (state regulation barring law students and paraprofessionals from inmates invalidated); *see* Cruz v. Beto, 603 F.2d 1178, 1185 (5th Cir. 1979) (prison officials may restrict attorney-client contacts by reasonable administrative rules); Davis v. United States, 455 F.2d 919, 920 (5th Cir. 1972) (access to courts not infringed when attorney's assistant denied interview with inmate), *aff'd*, 411

restrictions have been held to include the discretionary banning of disruptive attorneys,[64] confiscation of legal papers,[65] limitations on free postage,[66] forty-eight hour detention of mail addressed to attorneys,[67] and opening of incoming mail from attorneys.[68] Prison officials also have the power to regulate the "time, place and manner" in which prisoners in punitive isolation may communicate with attorneys and courts. To justify more rigorous limitations on access to the courts, the prison authorities must demonstrate a compelling need based on penitentiary discipline and administration.[69] The courts have considered each case individually, balancing the prisoners' fourteenth amendment right of access to the courts with the prison's interest in security.[70]

U.S. 233 (1973).

[64] Cruz v. Beto, 603 F.2d 1178, 1185 (5th Cir. 1979) (prison officials may exercise discretion in barring disruptive attorneys); *see* Elie v. Henderson, 340 F. Supp. 958, 967-68 (E.D. La. 1972) (attorney properly denied opportunity to visit prisoners who "were not and never had been his clients" and who had not requested counsel).

[65] Guajardo v. Estelle, 580 F.2d 748, 758 (5th Cir. 1978) (48 hour detention of mail to verify attorney's identity upheld); Tyler v. "Ron" Deputy Sheriff or Jailer/Custodian of Prisoners, 574 F.2d 427, 429 (8th Cir. 1978) (per curiam) (jailer's taking of inmate's legal papers for a few hours did not interfere with right of access to courts).

[66] *See, e.g.*, Guajardo v. Estelle, 580 F.2d 748, 756 (5th Cir. 1978) (prison officials may control bulk mailings); Coleman v. Crisp, 444 F. Supp. 31, 32 (W.D. Okla. 1977) (prisoner's letters to judge returned because prisoner exceeded his quota of free postage; prisoner does not have a right to unlimited free postage).

[67] Guajardo v. Estelle, 580 F.2d 748, 758 (5th Cir. 1978) (prison officials may retain an inmate's outgoing mail designated as being sent to an attorney "to ensure only actual attorneys will receive this special correspondence"); *cf.* Taylor v. Sterrett, 532 F.2d 462, 473-74 (5th Cir. 1976) (outgoing mail to an identifiable attorney must be sent unopened).

[68] Guajardo v. Estelle, 580 F.2d 748, 758 (5th Cir. 1978); *see* Taylor v. Sterrett, 532 F.2d 462, 475 (5th Cir. 1976) (incoming mail from an identifiable attorney must be opened in presence of prisoner and may not be censored or read).

[69] McCray v. Sullivan, 509 F.2d 1332, 1337 (5th Cir.), *cert. denied*, 423 U.S. 859 (1975); *cf.* Lynott v. Henderson, 610 F.2d 340, 344 (5th Cir. 1980) (regulations concerning visitation by a person other than an attorney must advance legitimate penological objectives).

[70] Our cases have established several general principles . . . . First, we have held that convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison . . . . But our cases also have insisted on a second proposition: simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations . . . . Third, maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted

Prison administrators, while exercising great discretion, may not obstruct an inmate's right to reach the courts. The fundamental constitutional right of access to the courts requires prison officials to help inmates prepare and file "meaningful" legal papers by providing access to adequate law libraries or adequate assistance from persons trained in law.[71] However, neither the fourteenth nor the sixth amendment requires the states to provide free attorneys for inmates once guilt has been adjudicated;[72] but the burden is on jail authorities[73] to show that "all inmates of a jail have adequate access to the courts through means other than by access to legal materials" where access to a law library is limited.[74] Even where prison law library facilities are adequate, courts have required the state to provide inmate writ-writers since the average inmate lacks the education to use effectively the facilities provided.[75] This requirement has been

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> prisoners and pretrial detainees . . . . Finally, . . . [because] the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions, [sic] [p]rison administrators . . . should be accorded wide-ranging deference in adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.

Bell v. Wolfish, 441 U.S. 520, 545-47 (1979).

[71] *See* Bounds v. Smith, 430 U.S. 817, 828 (1977) (a library need not be established in every prison within a state decentralized prison system where all prisoners had access to a library at another prison); Procunier v. Martinez, 416 U.S. 396, 419-21 (1974) (right of access to court unconstitutionally restricted by ban of attorney-client interviews by law students or paraprofessionals); Johnson v. Avery, 393 U.S. 483, 485 (1969) (in the absence of a legal assistance program, inmates may not be prevented from giving assistance to other inmates); Cruz v. Hauck, 515 F.2d 322, 331 (5th Cir. 1975) (when access to a library is limited, authorities must provide inmates other "adequate access" to courts); Morgan v. Sproat, 432 F. Supp. 1130, 1157-59 (S.D. Miss. 1977) (access to the courts must be provided to juveniles committed to a state training school); Stevenson v. Reed, 391 F. Supp. 1375, 1381 (N.D. Miss. 1975) (state must provide some source of legal assistance to inmates in addition to furnishing legal materials), *aff'd*, 530 F.2d 1207 (5th Cir.), *cert. denied*, 429 U.S. 944 (1976); Gilmore v. Lynch, 319 F. Supp. 105, 110 (N.D. Cal. 1970) (inmates entitled to access to reasonable law library), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam).

[72] Stevenson v. Reed, 391 F. Supp. 1375, 1377-79 (N.D. Miss. 1975), *aff'd*, 530 F.2d 1207 (5th Cir.), *cert. denied*, 429 U.S. 944 (1976).

[73] Novak v. Beto, 453 F.2d 661, 664 (5th Cir. 1971) (the state has the burden of justifying its regulations limiting inmate assistance and of demonstrating that the legal needs of inmates are satisfied).

[74] Cruz v. Houck, 515 F.2d 322, 332 (5th Cir. 1975).

[75] Stevenson v. Reed, 391 F. Supp. 1375, 1381 (N.D. Miss. 1975), *aff'd*, 530 F.2d

held to encompass programs providing not only assistance in post conviction relief but also vindication of civil rights and representation in general civil matters.[76]

Where an attorney-client relationship exists, prison officials may restrict attorney-client contacts by enforcing reasonable rules and regulations for the maintenance and security of the prison.[77] Even the broadest discretion, however, will not justify deprivation of constitutional rights.[78]

In *Cruz v. Beto*,[79] twelve inmates and their attorney sued the Texas Department of Corrections for interference with the attorney-client relationship. The attorney was denied permission to consult with her clients, who were placed in punitive isolation for seeking her representation.[80] The Fifth Circuit found that the Department had acted in bad faith, arbitrarily and unjustifiably, and awarded damages to the twelve inmates based on the deprivation and humiliation they had suffered while segregated. The court also awarded damages to the attorney for humiliation, embarrassment, and improper deprivation of her first and fourteenth amendment rights.[81] Although the district court erroneously had required the defendants to show good faith, the Fifth

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1207 (5th Cir.), *cert. denied*, 429 U.S. 944 (1976); *see* Wolff v. McDonnell, 418 U.S. 539, 570 (1974) (state must provide uneducated prisoner with a means of intelligent communication with courts); Morgan v. Sproat, 432 F. Supp. 1130, 1158-59 (S.D. Miss. 1977) (juveniles of subnormal intellectual capacity committed to state training school must be provided access to the courts).

[76] *See* Procunier v. Martinez, 416 U.S. 396, 419 (1974) (access to the courts must be afforded prisoners seeking redress for violations of their constitutional rights); Corpus v. Estelle, 551 F.2d 68, 70-71 (5th Cir. 1977) (reasonable access to the courts must include access in general civil legal matters and civil rights actions).

In Mississippi, a county inmate or a person on his behalf may file a complaint concerning improper treatment with any county officer who must investigate the complaint. If the complaint is found to be legitimate, the officer must report it to the board of supervisors, which shall request the appearance of the complaining party and take appropriate action. MISS. CODE ANN. § 47-1-29 (1972).

[77] Cruz v. Beto, 603 F.2d 1178, 1185 (5th Cir. 1979) (attempts by attorney to do no more than seek redress for the rights of clients cannot be restricted).

[78] Wolff v. McDonnell, 418 U.S. 539, 600-01 (1974) (Douglas, J., dissenting) (broad discretion cannot be used to punish prisoners exercising their rights to counsel and access to the courts).

[79] 603 F.2d 1178 (5th Cir. 1979).

[80] *Id.* at 1180.

[81] *Id.* at 1185-86.

Circuit held that the burden lies properly with the plaintiffs to prove bad faith to justify an award of damages.[82] In this case the award was justified since the district court made a specific finding that the Department had acted in bad faith.[83]

The right of access to the courts has also been held to protect the privacy of attorney-client consultation. Such blatant intrusions as eavesdropping[84] and interference with attorney-client mail[85] have been held actionable. Furthermore, to protect the privacy of attorney-client consultations, one court required a prison to provide a room with adequate privacy for such interviews.[86]

In addition to access to the courts, the first amendment has been held to protect attorney-client correspondence. In *Procunier v. Martinez*,[87] California prison officials were charged with wrongfully obstructing outgoing inmate mail. After noting that the first amendment rights of persons outside the prison had been violated,[88] the Supreme Court held that prison officials had wrongfully obstructed outgoing mail.[89] Subsequently, in *Pell v. Procunier*,[90] the Supreme Court addressed the question whether prisoners' first amendment rights are violated by the opening of outgoing mail. Writing for the Court, Justice Stewart stated that "prisoners do retain those first amendment rights that are not inconsistent with their status as a prisoner with the legitimate penological objectives of the correctional system."[91]

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[82] *Id.* at 1184-85; *see* Procunier v. Navarette, 434 U.S. 555, 566 (1978) (prison officials' qualified immunity will not be denied absent proof of a "malicious intent to harm"); *cf.* Corpus v. Estelle, 551 F.2d 68, 70 (5th Cir. 1977) (state or state agency has burden of proving existence of reasonable alternatives in specific terms); Novak v. Beto, 453 F.2d 661, 664 (5th Cir. 1971) (same).

[83] 603 F.2d at 1185; *see* notes 159 through 218 and accompanying text *infra*.

[84] *See* Heidleberg v. Hammer, 577 F.2d 429, 432 (7th Cir. 1978) (eavesdropping on attorney-client conversations is actionable).

[85] *See* notes 66 and 67 *supra*.

[86] Inmates of Henry County Jail v. Parham, 430 F. Supp. 304, 309 (N.D. Ga. 1976); *see* Adams v. Carlson, 488 F.2d 619, 632 (7th Cir. 1973) (prison officials enjoined from limiting attorney-client conferences to partitioned visiting rooms).

[87] 416 U.S. 396 (1974).

[88] *Id.* at 398.

[89] *Id.* at 408-09.

[90] 417 U.S. 817 (1974).

[91] *Id.* at 822. The balancing of first amendment interests against legitimate goals and policies of the correctional system has been consistently followed in later cases. *See*

Interpreting *Martinez* and *Pell*, the Fifth Circuit in *Taylor v. Sterrett*[92] held that the first amendment right of unopened outgoing mail extends to any identifiable attorney who represents or is asked to represent a prisoner in any civil or criminal matter.[93] The court also held that incoming mail could be opened to inspect for contraband only in the presence of the inmate recipient.[94]

The first amendment has also been held to require state prison officials to furnish postage and stationery to indigent inmates for attorney-client correspondence.[95] Reasonable restrictions on attorney-client mail are permissible if they further a substantial governmental interest and the limitation on first amendment freedoms is deemed necessary.[96] Thus, governmental interests must be balanced with the inmate's fundamental right to unfettered access to the courts.[97] Unfettered access has

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Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 129-30 (1977) (mutual accommodation is sought between the objectives of prisons and first amendment rights); Guajardo v. Estelle, 580 F.2d 748, 760 (5th Cir. 1978) ("prisoners retain those first amendment rights not inconsistent with prison security, order, or rehabilitation").

[92] 532 F.2d 462 (5th Cir. 1976).

[93] *Id.* at 475; *see, e.g.*, Preston v. Cowan, 369 F. Supp. 14, 23 (W.D. Ky. 1973) (prisoners entitled to noncensorship of mail sent to identifiable attorneys); Palmigiano v. Travisono, 317 F. Supp. 776, 788-89 (D.R.I. 1970) (prison officials shall not open correspondence between inmate and licensed attorney). *Contra*, Cox v. Crouse, 376 F.2d 824, 826 (10th Cir. 1967) (per curiam) (warden allowed to read and communicate to attorney general the contents of letters from prisoners to attorneys), *cert. denied*, 389 U.S. 865 (1967).

[94] 532 F.2d at 465-69.

[95] *But see* Ford v. Schmidt, 577 F.2d 408, 410 (7th Cir. 1978) (system denying free postage to indigent inmates in emergencies deemed not to violate due process); Coleman v. Crisp, 444 F. Supp. 31, 32 (W.D. Okla. 1977) (inmates not permitted unlimited free postage).

[96] *See* Bell v. Wolfish, 441 U.S. 520, 545-47 (1979) (even though prison rules infringe on constitutional guarantees such as the first amendment, the constitutional considerations must be balanced against the purpose of the rule); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 125 (1977) (the necessities of prison administration allow tighter restrictions on prisoners' first amendment rights than would be permissible outside prison); Wolff v. McDonnell, 418 U.S. 539, 555 (1974) (there must be an accommodation between prison needs and specific constitutional rights infringed upon); Price v. Johnston, 334 U.S. 266, 285 (1948) (withdrawal of constitutional rights is justified by the special nature of penal systems).

[97] McCrary v. Sullivan, 509 F.2d 1332, 1337 (5th Cir. 1975) (quoting Adams v. Carlson, 488 F.2d 619, 630 (7th Cir. 1973)).

also been held to apply to county jails as well as state prisons.[98]

III. Attorney's Fees

A. *The American Rule*

At common law, the English courts had the power to award attorney's fees to successful plaintiffs.[99] However, as stated in 1967 by the Supreme Court in *Fleishmann Distilling Corp. v. Maier Brewing Co.*,[100] the American rule "has traditionally been that ordinarily attorneys' fees are not recoverable . . . ."[101] The basis of this rule was the belief that each party should bear the burden of his own costs.[102] Because of obvious inequities,[103] the American rule has been eroded by statutory and judicial exceptions.

B. *Exceptions*

1. Bad Faith

An established exception to the American rule applies when the losing party has acted "in bad faith, vexatiously, wantonly,

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[98] Cook v. Brockway, 424 F. Supp. 1046, 1050 (N.D. Tex.) (quoting Barlow v. Amiss, 477 F.2d 896, 898 (5th Cir. 1973)), *aff'd mem.*, 559 F.2d 1214 (5th Cir. 1977).

[99] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 n.18 (1975) (quoting Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967) (early English court could award fees to successful attorney)).

[100] 386 U.S. 714 (1967).

[101] *Id.* at 717. Costs are recoverable against the losing party under 28 U.S.C. §§ 1920, 1923(a) (1976). Section 1920 specifies what a federal court may tax as cost. Docket fees and costs of filing briefs are specified under § 1923(a).

[102] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 250 & n.24 (1975) (discussing purpose for passing federal legislation concerning taxation of attorney's fees). *See also* H.R. Rep. No. 50, 32d Cong., 1st Sess. (1852) (same).

[103] *See generally* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Calif. L. Rev. 792, 798-800 (1966) (brief discussion of the American rule); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 Iowa L. Rev. 75, 75-82 (1963) (examination of the American rule); McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 Ford. L. Rev. 761, 765-70 (1972) (discussion of the American rule and its exceptions); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. Colo. L. Rev. 202, 207-21 (1966) (review of the American experience); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. Pa. L. Rev. 636, 648-55 (1974) (argument for a new American rule); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 Vand. L. Rev. 1216, 1226-30 (1967) (review of the qualifications to the American rule).

or for oppressive reasons."[104] This punitive award is imposed to discourage actions that unduly delay or disrupt litigation or impede enforcement of court orders.[105] Also, some courts have recently emphasized that the burden of showing bad faith is on the plaintiff.[106] The court in *Gates v. Collier*[107] had no difficulty in awarding attorney's fees for the state's denial of unconstitutional practices and conditions at Parchman Prison. According to the court, litigation was necessary only because the state had unreasonably refused to comply with established constitutional principles concerning prisons.[108] Thus, attorney's fees of $41,750.00 were assessed by the court against funds appropriated for the state prison.[109] In *Miller v. Carson,*[110] a case "strikingly similar" to *Gates,* the Fifth Circuit followed the *Gates* rationale in holding a sheriff individually liable for attorney's fees.[111] Although both *Gates* and *Miller* involved massive reform, the Fifth Circuit has applied the bad faith exception to single incidents affecting one person.[112]

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[104] 6 MOORE'S FEDERAL PRACTICE ¶ 54.77[2] (2d ed. 1976), *quoted in* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975).

[105] Hutto v. Finney, 437 U.S. 678, 689 n.14 (1978); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 n.4 (1968) (per curiam); *cf.* FED. R. CIV. P. 56(g) (attorney's fees to be awarded against party filing summary judgment affidavits "in bad faith or solely for the purpose of delay"); *id.* 37(a)(4)(in motions to compel discovery, prevailing party may recover attorney's fees).

Additionally, civil contempt penalties may include attorney's fees. *See, e.g.,* Hutto v. Finney, 437 U.S. at 689 n.14; Aleyska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. at 258.

[106] Cruz v. Beto, 603 F.2d 1178, 1184 (5th Cir. 1978); Young v. Peoria Hous. Auth., 479 F. Supp. 1093, 1097 (C.D. Ill. 1979).

[107] 371 F. Supp. 1368, 1371 (N.D. Miss. 1973), *vacated and remanded per curiam,* 522 F.2d 81 (5th Cir. 1975). The test for bad faith justifying an award of attorney's fees in the Fifth Circuit is also illustrated in Jinks v. Mays, 464 F.2d 1223, 1228 (5th Cir. 1972); Horton v. Lawrence County Bd. of Educ., 449 F.2d 290, 295 (5th Cir. 1971); Lee v. Southern Home Sites Corp., 429 F.2d 290, 295-96 (5th Cir. 1970); Williams v. Kimbrough, 415 F.2d 874, 875 (5th Cir. 1969) (per curiam), *cert. denied,* 396 U.S. 1061 (1970).

[108] 371 F. Supp. at 1371.

[109] *Id.* at 1373.

[110] 563 F.2d 741 (5th Cir. 1977).

[111] *Id.* at 754-56.

[112] Carter v. Noble, 526 F.2d 677, 678-79 (5th Cir. 1976) (per curiam).

2. Common Benefit

"Common benefit," another judicial exception, is based on the court's traditional equity power to award costs, including attorney's fees, to a party who recovers a fund for the benefit of others either from the fund or directly from the beneficiaries.[113] The rationale behind this exception is that to allow others to benefit from a plaintiff's work amounts to unjust enrichment since the others did not contribute to the litigation expenses.[114] In *Miller v. Carson*,[115] attorney's fees were awarded under the common benefit exception for successful vindication of constitutional rights regarding conditions in a county jail. Improvement of jail conditions was considered the "common benefit" to all the citizens of the county, justifying the award of attorney's fees against local officials.[116] The awarding of attorney's fees under this exception is not predicated upon a monetary recovery.[117]

3. Private Attorney General

In *Newman v. Piggie Park Enterprises, Inc.*,[118] the Supreme Court authorized an award of attorney's fees to the prevailing party to effectuate the purposes of Title II of the Civil Rights Act of 1964.[119] The Court explained that the prevailing party obtained relief not only for himself but as a "private attorney general," thus furthering the rights of all citizens under Title II.[120] Noting that only injunctive relief is available under Title II, the

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[113] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-92 (1970); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718-19 (1967); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939); Trustees v. Greenough, 105 U.S. 527, 533-34 (1882). *See generally* Dawson, *Lawyers and Involuntary Clients: Attorney's Fees From Funds*, 87 HARV. L. REV. 1597 (1974) (traces development of "common fund" mechanism).

[114] Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-92 (1970); Miller v. Carson, 401 F. Supp. 835, 849 (M.D. Fla. 1975), *aff'd in part and modified in part*, 563 F.2d 741, 754-56 (5th Cir. 1977) (the Fifth Circuit did not discuss this method of recovery).

[115] 401 F. Supp. 835, 853 (M.D. Fla. 1975), *aff'd in part and modified in part*, 563 F.2d 741, 754-56 (5th Cir. 1977).

[116] 401 F. Supp. at 853.

[117] *Id.* at 851.

[118] 390 U.S. 400, 401 (1968) (per curiam).

[119] 42 U.S.C. §§ 2000a-3(b) (1976).

[120] 390 U.S. at 402.

Court reasoned that the public interest would not be served by aggrieved parties' seeking of injunctive relief if successful plaintiffs are forced to pay their own attorney's fees. Thus, the Court awarded fees to encourage enforcement of citizens' rights.[121]

Following *Piggie Park*, several lower federal courts applied the "private attorney general" theory as an exception to the American rule in awarding attorney's fees.[122] In enjoining discriminatory practices, the Fifth Circuit has included attorney's fees to ensure an effective remedy.[123] Without financial or other assistance, private enforcement of constitutional rights has been deemed to be unlikely.[124]

In 1975, the Supreme Court, in *Alyeska Pipeline Service Co. v. The Wilderness Society*,[125] reversed an award of attorney's fees based on the private attorney general theory. Abrogating that exception, the Court adhered to a narrow interpretation of the American rule.[126] The Court added that while the traditional (bad faith, common benefit, and statutory) exceptions were still viable, none was applicable in the instant case.[127] Although *Alyeska Pipeline* involved protection of statutory rights, its sweeping language has been construed by the lower federal courts as precluding recovery of fees even where denial may

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[121] *Id.*

[122] *See, e.g.*, Hoitt v. Vilck, 495 F.2d 219, 220-21 (1st Cir. 1974) (state prison suit for deprivation of constitutional rights); Cornist v. Richland Parish School Bd., 495 F.2d 189, 192 (5th Cir. 1974) (per curiam) (racial discrimination); Wilderness Soc'y v. Morton, 495 F.2d 1026, 1032 (D.C. Cir. 1974) (environmental protection), *rev'd sub nom.* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); Fairly v. Patterson, 493 F.2d 598, 606 (5th Cir. 1974) (reapportionment for county board of supervisors); Lee v. Southern Home Sites Corp., 444 F.2d 143, 147-48 (5th Cir. 1971) (racial discrimination); Camprise v. Hamilton, 382 F. Supp. 172, 186 (S.D. Tex. 1974) (state prisoner sued jailer under 42 U.S.C. § 1983 (1976)), *cert. denied*, 429 U.S. 1102 (1977). *But see* Bradley v. School Bd., 472 F.2d 318, 327-31 (4th Cir. 1972) (Fourth Circuit refused to adopt the "private attorney general" rule), *vacated on other grounds*, 416 U.S. 696 (1974).

[123] Lee v. Southern Home Sites Corp., 444 F.2d 143, 144 (5th Cir. 1974). The Fifth Circuit in *Lee* also required that the district court prepare findings of fact to explain its grounds for denial of fees. *Id.* at 144; *accord*, Cooper v. Allen, 467 F.2d 836, 841 (5th Cir. 1972) (attorney's fees should be awarded unless a district court can articulate specific reasons for denying it).

[124] Lee v. Southern Home Sites Corp., 444 F.2d 143, 146 (5th Cir. 1971).

[125] 421 U.S. 240, 241 (1975).

[126] *Id.* at 269.

[127] *Id.* at 259.

emasculate congressional enactments specifically designed to protect constitutional rights.[128]

4. Statutory

In 1976, Congress enacted the Civil Rights Attorney's Fees Awards Act,[129] on the heels of *Alyeska Pipeline*. The Act states that attorney's fees may be awarded to the prevailing party as part of the costs in suits under section 1983[130] and certain other statutes.[131] In passing section 1988, Congress bolstered the statutory exception[132] to the American rule by encouraging private litigation to enforce civil rights.[133] Furthermore, the Act has been interpreted to apply retroactively to suits pending at the time of enactment.[134] Although section 1988 grants trial courts "discretion" in awarding attorney's fees,[135] the Fifth Circuit has

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[128] *See, e.g.*, Miller v. Carson, 401 F. Supp. 835, 850 (M.D. Fla. 1975), *aff'd in part and modified in part*, 563 F.2d 741, 754-56 (5th Cir. 1977) (although the district court based its award of attorney's fees on the "private attorney general" theory, on appeal the Fifth Circuit did not mention it).

[129] 42 U.S.C. § 1988 (1976) provides in part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et. seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et. seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[130] 42 U.S.C. § 1983 (Supp. III 1979); *see* note 167 *infra*.

[131] *See* note 129 *supra*.

[132] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260 n.33 (1975) (list of federal statutes that provide specifically for attorney's fees).

[133] Hutto v. Finney, 437 U.S. 678, 692 (1978); Crowe v. Lucas, 595 F.2d 985, 994 (5th Cir. 1979); Francia v. White, 594 F.2d 778, 781-82 (10th Cir. 1979); Donaldson v. O'Connor, 454 F. Supp. 311, 313 (N.D. Fla. 1978).

[134] *See, e.g.*, Miller v. Carson, 563 F.2d 741, 754 (5th Cir. 1977) (federal detainee sues county jail under § 1983 challenging conditions); Rainey v. Jackson State College, 551 F.2d 672, 675-76 (5th Cir. 1977) (first amendment challenge to termination of teacher's contract); M.C.I. Concord Advisory Bd. v. Hall, 457 F. Supp. 911, 913 (D. Mass. 1978) (§ 1983 suit challenging conditions at state penitentiary); Cruz v. Beto, 453 F. Supp. 905, 906 (S.D. Tex. 1977) (attorneys and inmates denied access to courts and each other), *aff'd*, 603 F.2d 1178 (5th Cir. 1979).

[135] *See* note 129 *supra*. *But cf.* Horton v. Lawrence County Bd. of Educ., 449 F.2d 793, 794 (5th Cir. 1971) (the court of appeals is not empowered to make an initial adjudication of attorney's fees).

consistently held that absent special circumstances which would render an award of attorney's fees unjust, a prevailing party in section 1988 actions should be entitled to attorney's fees.[136] The courts have been liberal in their definition of "prevailing parties." Although the party must prevail on a significant issue that goes to the heart of the suit,[137] fees may be awarded on preliminary orders.[138] Moreover, failure to obtain a monetary recovery does not preclude application of section 1988.[139] On the contrary, awards have been granted even where the "prevailing party" was denied formal judicial relief.[140] Fees have also been allowed where the contested practices were voluntarily discontinued[141] or disposed of through consent decree.[142] Proper recip-

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[136] *E.g.*, Iranian Students Ass'n v. Edwards, 604 F.2d 352, 353 (5th Cir. 1979); Concerned Democrats of Fla. v. Reno, 601 F.2d 891, 892 (5th Cir. 1979); Crowe v. Lucas, 595 F.2d 985, 993 (5th Cir. 1979); Criterion Club v. Board of Comm'rs, 594 F.2d 118, 120 (5th Cir. 1979) (per curiam); Morrow v. Dillard, 580 F.2d 1284, 1300 (5th Cir. 1978); Brown v. Culpepper, 559 F.2d 274, 277 (5th Cir. 1977); *accord*, Fischer v. Adams, 572 F.2d 406, 410-11 (1st Cir. 1978) (party prevailing on the merits of a discrimination complaint may be granted attorney's fees); M.C.I. Concord Advisory Bd. v. Hall, 457 F. Supp. 911, 913 n.3 (D. Mass. 1978) (plaintiff prevailing in § 1983 challenge to conditions at state penitentiary entitled to attorney's fees).

[137] Iranian Student Ass'n v. Edwards, 604 F.2d 352, 353 (5th Cir. 1979); Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978); Howard v. Phelps, 443 F. Supp. 374, 376 (E.D. La. 1978); *see* H.R. REP. No. 94-1558, 94th Cong., 2d Sess. 2, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5909-10 (legislative history relevant to this point).

Some courts have held that the issue of attorney's fees goes to the heart of the suit, allowing attorney's fees to be awarded for work spent on obtaining the fees. *E.g.*, Hutto v. Finney, 437 U.S. 678, 681, 689 (1978); Gagne v. Maher, 594 F.2d 336, 344 (2d Cir. 1979); Lund v. Affleck, 587 F.2d 75, 77 (1st Cir. 1978); Donaldson v. O'Connor, 454 F. Supp. 311, 317 (N.D. Fla. 1978); Cruz v. Beto, 453 F. Supp. 905, 909 (S.D. Tex. 1977), *aff'd*, 603 F.2d 1178 (5th Cir. 1979); M.C.I. Concord Advisory Bd. v. Hall, 457 F. Supp. 911, 914 (D. Mass. 1978).

[138] Iranian Students Ass'n v. Edwards, 604 F.2d 352, 353 (5th Cir. 1979); Criterion Club v. Board of Comm'rs, 594 F.2d 118, 120 (5th Cir. 1979); Gagne v. Maher, 594 F.2d 336, 340-41 (2d Cir. 1979); Howard v. Phelps, 443 F. Supp. 374, 375 (E.D. La. 1978); *cf.* Ruiz v. Estelle, 609 F.2d 118, 118-19 (5th Cir. 1980) (fees awarded for obtaining class certification did not conclusively determine a question subject to later consideration; thus, it was not considered a final order capable of appeal).

[139] Donaldson v. O'Connor, 454 F. Supp. 311, 315 (N.D. Fla. 1978).

[140] *Id.* at 316; *see* H.R. REP. No. 94-1558, 94th Cong., 2d Sess. 5, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912-13 (stating that a court should award fees although no formal relief is granted to the prevailing party).

[141] *See* Inmates of Neb. Penal & Correctional Complex v. Greenholtz, 567 F.2d 1381, 1383 (8th Cir. 1977) (fees awarded where state prisoners were denied relief from unconstitutional parole practices).

[142] *See, e.g.*, Bradley v. School Bd. of Richmond, 416 U.S. 696, 722 n.28 (1974) (fees

ients have included legal services organizations[143] and court-appointed attorneys.[144] However, in calculating fee awards, it has been held that work spent on pendent state claims may not be considered.[145]

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awarded for work performed short of ultimate determination); Brown v. Culpepper, 559 F.2d 274, 277 (5th Cir. 1977) (fees awarded even though suit settled by voluntary agreement); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 283 (6th Cir. 1974) (award based on consent decree); Adams v. Mathis, 458 F. Supp. 302, 305, 309 (M.D. Ala. 1978) (award granted upon a partial consent decree); M.C.I. Concord Advisory Bd. v. Hall, 457 F. Supp. 911, 914 (D. Mass. 1978) (award granted upon consent decree).

In Parker v. Matthews, 411 F. Supp. 1059, 1064 (D.D.C. 1976), *aff'd sub nom.* Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977), the court stated that before an award would be made upon a settlement, it would scrutinize all the circumstances surrounding the settlement, focusing primarily upon the reason the action was brought and whether or not the plaintiff wins on the central issues.

[143] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 262 n.36 (1975) (no intent to restrict recovery of attorney's fees by legal services organizations where other plaintiffs would be awarded such fees); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 286 (6th Cir. 1974) (awarding fees to legal services, rejecting the argument that the award should be denied since the legal services were partially funded by federal grants); Fairly v. Patterson, 493 F.2d 598, 606 (5th Cir. 1974) (fees awarded in reapportionment suit to attorneys of a nonprofit, tax-exempt foundation); Barret v. Kalinowski, 458 F. Supp. 689, 701 (M.D. Pa. 1978) (awarded fees to public service lawyers in a prisoner civil rights action, stating that such compensation encouraged the lawyers to engage in civil rights litigation); Donaldson v. O'Connor, 454 F. Supp. 311, 313 (N.D. Fla. 1978) (that counsel was supported by public funds was irrelevant to determination of fees awarded); Howard v. Phelps, 443 F. Supp. 374, 377 (E.D. La. 1978) (awarding fees in racial discrimination suit, stating that the only requirement for the award was the existence of an attorney-client relationship); Lund v. Affleck, 442 F. Supp. 1109, 1111-12 (D.R.I. 1977) (court noting that legal services organizations had limited resources, and that fees award would encourage representation in civil rights actions), *aff'd*, 587 F.2d 75 (1st Cir. 1978).

[144] Miller v. Carson, 563 F.2d 741, 756 (5th Cir. 1977). *But cf.* Davis v. Parratt, 608 F.2d 717, 718 (8th Cir. 1979) (§ 1983 not meant to compensate pro se litigants; presupposes an attorney-client relationship). For a discussion of prisoners' pro se complaints, see Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam) (dismissal of pro se complaint reversed, stating that pro se complaints are held to less stringent standards); Covington v. Cole, 528 F.2d 1365, 1369-70 (5th Cir. 1970) (dismissal reversed where complaint had technical errors; court held that pro se complaints must be read very liberally).

[145] Barrett v. Kalinowski, 458 F. Supp. 689, 700 (M.D. Pa. 1978); *cf.* Baughman v. Wilson Freight Forwarding Co., 583 F.2d 1208, 1215 (3d Cir. 1978) (plaintiff is not entitled to attorney's fees under § 1988 if he prevails solely on a pendent federal statutory claim). *But cf.* Lund v. Affleck, 587 F.2d 75, 76-77 (1st Cir. 1978) (fact that plaintiff prevailed solely on pendent federal statutory claim did not preclude award of attorney's fees under § 1988).

C. Assessment

Section 1988 directs courts to award "reasonable" fees.[146] Although mathematical precision is not required, the burden is on the plaintiff to prove a "reasonable" fee.[147] The court need only ascertain, through timetables or its own observation, that the hours claimed reasonably reflect the services performed.[148] The Fifth Circuit case of *Johnson v. Georgia Highway Express, Inc.*[149] is considered the "guidepost" in calculating a reasonable fee.[150] The court's test comprised twelve factors: (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill required to perform the legal services properly; (4) preclusion of other employment as a result of the attorney's acceptance of the case; (5) the customary fee in the area;[151] (6)

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[146] *See* note 129 *supra.*

[147] Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 720 (5th Cir. 1974) (plaintiff has the burden of proving attorney's fees just as those who have the burden of proving any other money claim); Cruz v. Beto, 453 F. Supp. 905, 907-08 (S.D. Tex. 1977) (plaintiff has burden of proving fees), *aff'd*, 603 F.2d 1178 (5th Cir. 1979). *Compare* Brown v. Stackler, 460 F. Supp. 446, 447 (N.D. Ill. 1978) (attorney's fees denied entirely when court considered them outrageously excessive and a reasonably competent attorney could not have spent one eighth the time claimed) *with* Miller v. Carson, 401 F. Supp. 835, 858 (M.D. Fla. 1975) (attorney's fees reduced because some work could have been assigned to a paralegal), *aff'd in part and modified in part on other grounds*, 563 F.2d 741 (5th Cir. 1977).

[148] *See* Cruz v. Beto, 453 F. Supp. 905, 908 (S.D. Tex. 1977) (where the court is "intimately familiar" with the litigation, it may "rely chiefly on its own observations, and experience" in deciding fee awards), *aff'd*, 603 F.2d 1178 (5th Cir. 1978). *But see* Hutto v. Finney, 437 U.S. 678, 691-92 & nn.17-18 (1978) (Court awarded "substantial attorneys' fees" to punish defendants for bad faith rather than to compensate plaintiff's attorneys for services performed); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 284 (6th Cir. 1974) (fee awards based on defendant's bad faith are punitive in nature).

[149] 488 F.2d 714 (5th Cir. 1974).

[150] The House and Senate reports, *see* S. REP. No. 94-1011, 94th Cong., 2d Sess. 4, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5913; H.R. REP. No. 94-1358, 94th Cong., 2d Sess. 4 (1976), state that courts should use the twelve standards enumerated in *Johnson* in determining the reasonableness of attorney's fees under § 1988. *See* Barrett v. Kalinowski, 458 F. Supp. 689, 707 (M.D. Pa. 1978) (factors identified in *Johnson* are to be considered by the court in the adjustment of fees); Adams v. Mathis, 458 F. Supp. 302, 309 (M.D. Ala. 1978) (*Johnson* provides the standards); Cruz v. Beto, 453 F. Supp. 905, 909 (S.D. Tex. 1977) (court used seven of the *Johnson* guidelines to fix the hourly rate of compensation), *aff'd*, 603 F.2d 1178 (5th Cir. 1979); Miller v. Carson, 401 F. Supp. 835, 857-60 (M.D. Fla. 1975) (court expressly applied the twelve guidelines in *Johnson*), *aff'd in part and modified in part on other grounds*, 563 F.2d 741 (5th Cir. 1977).

[151] *See* Donaldson v. O'Connor, 454 F. Supp. 311, 314 (N.D. Fla. 1978) (fees awarded

whether the fee was on a fixed or contingent basis; (7) time limits imposed by the client in particular circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.[152] Costs of litigation have also been included in awards.[153]

D. Eleventh Amendment

To contest an award of attorney's fees, defendants frequently claim immunity under the eleventh amendment. Although the eleventh amendment expressly prohibits any suits against the states in federal court,[154] the Supreme Court has allowed exceptions to this rule. In the landmark decision of *Ex parte Young*,[155] the Court held that although the eleventh amendment barred retrospective relief against a state, it did not bar injunctive prospective relief against a state even where the cost of compliance might be borne by the state. The Court has continued to deny retrospective relief against a state[156] except

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generally based on customary fee in area).

[152] 488 F.2d at 717-19.

[153] *See* Hutto v. Finney, 437 U.S. 678, 696 (1978) (a state may be treated as any other litigant when a federal court assesses costs); Miller v. Carson, 401 F. Supp. 835, 860-61 (M.D. Fla. 1975) (defendants were assessed with costs of service of process, witness fees, court reporter's fees for depositions, photographs, printing, publication and reproduction of documents), *aff'd in part and modified in part on other grounds*, 563 F.2d 741 (5th Cir. 1977). *But see* Barrett v. Kalinowski, 458 F. Supp. 689, 708 (M.D. Pa. 1978) (request for costs should have been submitted to court clerk since § 1988 did not empower the court to award costs as part of the relief).

[154] The eleventh amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced and prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State." U.S. CONST. amend. XI.

[155] 209 U.S. 123, 148 (1908); *see* Quern v. Jordan, 440 U.S. 332, 337, 346-49 (1979) (state immune from retroactive monetary relief but not from the cost of sending out notices pursuant to a court order); Milliken v. Bradley, 433 U.S. 267, 293 (1977) (Powell, J., concurring) (state ordered to pay about $5.8 million to help defray costs of desegregation decree for the Detroit school system); Edelman v. Jordan, 415 U.S. 651, 667-68 (1974) (same).

[156] *See, e.g.*, Quern v. Jordan, 440 U.S. 332, 345 (1979) (in a § 1983 action the eleventh amendment bars retrospective relief against a state); Edelman v. Jordan, 415 U.S. 651, 677 (1974) (same); Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 574, 579-80 (1946) (plaintiff unable to recover taxes wrongfully paid to the state); Ford Motor

where Congress has enacted legislation to enforce the fourteenth amendment, which overrides the eleventh amendment.[157] Since Congress passed section 1988 to aid enforcement of the fourteenth amendment, states are not immune from paying attorney's fees.[158] Furthermore, since local governments are not protected by the eleventh amendment,[159] they are not immune from paying attorney's fees under section 1988.[160]

E. Mississippi

In Mississippi the general rule is that, absent a statute, attorney's fees are not recoverable unless the defendant's actions warrant an award of punitive damages.[161] Although counsel ap-

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Co. v. Department of Treasury, 323 U.S. 459, 464 (1945) (same); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 51-53 (1944) (same).

[157] Fitzpatrick v. Bitzer, 427 U.S. 445, 456-57 (1976). The eleventh amendment is limited by the enforcement provisions of the fourteenth amendment, which grant to Congress the authority to enforce "by appropriate Legislation" the rights guaranteed by the fourteenth amendment. *Id.* Thus, Congress may override the states' eleventh amendment immunity by enacting legislation to enforce the fourteenth amendment. Not all legislation passed to enforce the fourteenth amendment, however, overrides the eleventh amendment. *See* Quern v. Jordan, 440 U.S. 332, 342-43 (1979) (Congress did not intend for § 1983 to override the eleventh amendment); Edelman v. Jordan, 415 U.S. 651, 663 (1974) (same); Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (same). There must be a clear showing of congressional intent to abrogate eleventh amendment immunity. Employees v. Missouri Public Health Dep't, 411 U.S. 279, 285 (1973).

[158] Hutto v. Finney, 437 U.S. 678, 693-94 (1978) (citing S. REP. No. 94-1011, 94th Cong., 2d Sess. 5, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5913; H.R. REP. No. 94-1558, 94th Cong., 2d Sess. 4 (1976)). *See, e.g.*, Rainey v. Jackson State College, 551 F.2d 672, 675 (5th Cir. 1977) (§ 1988 lifted the eleventh amendment bar to payment of attorney's fees by the state); Guajardo v. Estelle, 432 F. Supp. 1373, 1387 (S.D. Tex. 1977) (same), *aff'd in part and rev'd in part on other grounds*, 580 F.2d 748 (5th Cir. 1978).

The Court in *Hutto* recognized that the congressional intent of § 1988 was to override the eleventh amendment since two attempts to amend the Act to immunize states from fee awards had been defeated. 437 U.S. at 694. Awards against an official in his individual capacity are not affected by § 1988. M.C.I. Concord Advisory Bd. v. Hall, 457 F. Supp. 911, 913 n.1 (D. Mass. 1978) (citing *Hutto*).

[159] Quern v. Jordan, 440 U.S. 332, 338 (1979); Monell v. Department of Social Servs., 436 U.S. 611, 690 n.54 (1978); Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974).

[160] *See, e.g.*, Adams v. Mathis, 458 F. Supp. 302, 309 (M.D. Ala. 1978) (50% of attorney's fees assessed against county defendants and 50% against state defendants); Miller v. Carson, 401 F. Supp. 835, 862 (M.D. Fla. 1975) (attorney's fees and costs awarded against county sheriff's fund and against sheriff in his individual capacity), *aff'd in part and modified in part*, 563 F.2d 741 (5th Cir. 1977).

[161] Subscribers Cas. Reciprocal Exch. v. Totaro, 370 So. 2d 1342, 1342 (Miss. 1979);

pointed to defend an indigent during the criminal process is entitled to compensation,[162] apparently no statutes provide for attorney's fees in civil actions before or after trial. Also, attorney's fees are rarely awarded for suits in equity since punitive damages are not ordinarily awarded in chancery.[163] Thus, awards of attorney's fees in civil actions are limited to actions at law where a party's conduct warrants punitive damages.

IV. Liability on the Merits

A. *Qualified Immunity*

The eleventh amendment has also been asserted as a bar to liability on the merits in suits against state governments. Since states are immune from retroactive damages to be paid from the state treasury,[164] the courts are only free to order prospective injunctive relief against the state, though compliance may require large expenditures of state funds.[165] State officials, however, are not afforded immunity under the eleventh amendment if they deprive another of federal rights under color of state

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Gulf Steamship Co. v. Polk, 370 So. 2d 1348, 1351 (Miss. 1979); Bellefonte Ins. Co. v. Griffin, 358 So. 2d 387, 391 (Miss. 1978).

[162] Miss. Code Ann. § 99-15-17 (1972) (enumerates maximum compensation for attorneys appointed to represent indigents under Miss. Code Ann. § 99-15-15 (1972)).

[163] Subscribers Cas. Reciprocal Exch. v. Totaro, 370 So. 2d 1342, 1342 (Miss. 1979); Gulf Steamship Co. v. Polk, 370 So. 2d 1348, 1351 (Miss. 1979); Dedeaux v. Davro, 275 So. 2d 863, 864 (Miss. 1973); Bridges v. Land, 252 So. 2d 209, 211 (Miss. 1971).

[164] Quern v. Jordan, 440 U.S. 332, 337 (1979); Edelman v. Jordan, 415 U.S. 651, 663 (1974); Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 574, 579-80 (1946); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 51-53 (1944); Hansburg v. Regents, 596 F.2d 944, 949 n.16 (10th Cir. 1979); Jagnandan v. Giles, 538 F.2d 1166, 1176 (5th Cir. 1976); Davis v. Griffin-Spalding County Bd. of Educ., 445 F. Supp. 1048, 1054 (N.D. Ga. 1976).

[165] *E.g.*, Milliken v. Bradley, 433 U.S. 267, 293 (1977) (court granted injunctive relief against state requiring an expenditure of almost $6 million to defray costs of integrating Detroit school system); Williams v. Edwards, 547 F.2d 1206, 1212 (5th Cir. 1977) (injunction upheld since it provided only that if state continued operation of prisons, it must be in a constitutional manner, requiring expenditures of state funds); Alberti v. Sheriff of Harris County, 406 F. Supp. 649, 669 (S.D. Tex. 1975) (lack of adequate monetary resources does not excuse state's or local government's duty to provide facilities that meet constitutional standards); Gates v. Collier, 349 F. Supp. 881, 897 (N.D. Miss. 1972) (court realized that injunctive relief would require substantial expenditures of funds), *aff'd in part and modified in part*, 501 F.2d 1291 (5th Cir. 1974).

law.[166] Section 1983,[167] focusing on the nature of the official's action, provides a cause of action for deprivation of constitutional rights under color of state law.[168]

Ancient tort law and strong public policy support some degree of immunity.[169] A state official has a "qualified" immunity commensurate with the scope of discretion and responsibility inherent in his office.[170] In *Scheuer v. Rhodes*,[171] the United States

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[166] *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 322 (1975) (school board members personally liable for unconstitutional discharge of three students); Perez v. Rodriguez Bou, 575 F.2d 21, 23-24 (1st Cir. 1978) (university chancellor personally liable for unconstitutional discharge of students); West v. Keve, 571 F.2d 158, 162-63 (3d Cir. 1978) (case remanded to determine if prison official was personally liable for denying prisoner's medical needs); Palmer v. Penn-Ohio Road Materials, Inc., 470 F. Supp. 1199, 1203 (W.D. Pa. 1979) (absent immunity other than the eleventh amendment, a public employee is liable for tortious conduct).

[167] 42 U.S.C. § 1983 (Supp. III 1979) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[168] *Id.*

[169] *See* Martinez v. California, 100 S. Ct. 553, 557-58 (1980) (statute providing immunity for parole officers furthers policy of rehabilitation of inmates); Wood v. Strickland, 420 U.S. 308, 321 (1975) (public school officials must be offered some degree of immunity so they can perform their duties without undue timidity); Cruz v. Beto, 603 F.2d 1178, 1183 (5th Cir. 1978) (noting common law origins of qualified immunity and its underlying policies); Bogard v. Cook, 405 F. Supp. 1202, 1217 (N.D. Miss. 1975) (court refused to hold state penitentiary officials personally liable for damages on the basis of negligence as a matter of policy), *aff'd*, 586 F.2d 399 (5th Cir. 1978); Morgan v. Cook, 236 So. 2d 749, 750 (Miss. 1970) (management and operation of prisons, if reasonable, are within sound discretion of prison administration).

[170] *See* Procunier v. Navarette, 434 U.S. 555, 561-62 (1978) (public officials are not completely shielded from liability); O'Connor v. Donaldson, 422 U.S. 563, 569 (1975) (issue of liability for damages hinges on whether official knew or should have known that his actions, taken within the scope of his responsibility, violated constitutional rights); Wood v. Strickland, 420 U.S. 308, 322 (1975) (same); Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (scope of qualified immunity based on amount of discretion and responsibility of office and on circumstances at time of action); McNamara v. Moody, 606 F.2d 621, 625 (5th Cir. 1979) (qualified immunity varies with official's discretion and responsibility); Cruz v. Beto, 603 F.2d 1178, 1182 (5th Cir. 1979) (citing *Scheuer* for scope of qualified immunity); Knell v. Bensinger, 522 F.2d 720, 723 (7th Cir. 1975) (same); Norton v. McShane, 332 F.2d 855, 857-58 (5th Cir. 1964) (using "scope of authority" analysis in determining extent of immunity).

[171] 416 U.S. 232 (1974).

Supreme Court noted that qualified immunity is based upon an official's good faith belief that his actions were proper and that reasonable grounds existed for his belief at the time of his actions.[172] Since the Governor of Ohio was found to have "intentionally, recklessly, willfully, wantonly" and unnecessarily deployed the Ohio National Guard on the Kent State campus,[173] the Court held that he was "stripped of his official or representative character" and was personally liable for his actions.[174]

In 1975 the Supreme Court in *Wood v. Strickland*[175] developed a two-part test to determine an official's personal immunity. A school board official would be held liable under section 1983 if he (1) "knew or reasonably should have known" that his official action would violate another's constitutional rights—the objective standard; or (2) if he acted with malicious intent to deprive another of constitutional rights—the subjective standard.[176] Even if acting on a sincere subjective belief, the official would lose his qualified immunity under the objective test if his actions contradict "settled, indisputable law."[177]

Following these precedents, the Supreme Court in *Procunier v. Navarette*[178] elucidated the two-part *Wood* test.[179] The Court applied the objective standard without alteration, stating that no immunity exists if (1) the constitutional right in issue was clearly established at the time of the official's contested conduct; (2) the official knew or reasonably should have known of the right; and (3) if the official knew or should have known that his conduct violated that constitutional right.[180] The "malicious intent" standard of *Wood* was interpreted to include not only intentional behavior but also acts which, regardless of

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[172] *Id.* at 247-48.

[173] *Id.* at 235.

[174] *Id.* at 237. The Supreme Court did not reach the merits of the petitioners' claims, holding only that the district court's dismissal of their claims was improper and remanding for further proceedings. *Id.* at 250.

[175] 420 U.S. 308 (1975).

[176] *Id.* at 322.

[177] *Id.* at 321.

[178] 434 U.S. 555 (1978).

[179] *Id.* at 562.

[180] *Id.*

intent, were "substantially certain" to produce injury.[181] This standard echoes the congressional intent behind section 1983, *i.e.*, to hold state officials liable in damages for some actions without effecting a wholesale revocation of qualified immunities.[182]

In *Navarette,* the Supreme Court extended to state prison officials the same qualified immunity previously granted a university president, national guard members,[183] school board members,[184] a superintendent of a state mental institution,[185] and a policeman.[186] Because of their greater responsibilities, the Court noted that immunity granted state officials is generally broader than that granted local officials.[187] However, state officials must first satisfy the tests established in *Scheuer* and *Wood* to justify protection.[188]

Recently, the Supreme Court in *Owen v. City of Independence*[189] determined whether municipalities may assert the good faith of their officials as a defense under section 1983. The Court explained that since section 1983 does not mention any immunities on its face,[190] immunity is allowed only where strong public policy supports it,[191] or where the immunity was firmly rooted in the common law prior to the enactment of section 1983.[192] After

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[181] *Id.* at 566.

[182] *Id.* at 565-66.

[183] Scheuer v. Rhodes, 416 U.S. 232, 242-47 (1974).

[184] Wood v. Strickland, 420 U.S. 308, 321-22 (1975).

[185] O'Connor v. Donaldson, 422 U.S. 563, 577 (1975).

[186] Pierson v. Ray, 386 U.S. 547, 577 (1967).

[187] 434 U.S. at 561-62; *see* Cruz v. Beto, 603 F.2d 1178, 1184 (5th Cir. 1979) (drawing distinction between common law defenses available to policemen and defenses available to director of statewide prison system).

[188] *See* text accompanying notes 171 through 177 *supra.*

[189] 445 U.S. 622 (1980).

[190] *Id.* at 635.

[191] *Id.* at 637; *see, e.g.*, Procunier v. Navarette, 434 U.S. 555, 561-62 (1978) (qualified immunity for prison officials); O'Connor v. Donaldson, 422 U.S. 563, 576-77 (1975) (same); Wood v. Strickland, 420 U.S. 308, 321 (1975) (qualified immunity for school board); Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974) (qualified immunity for national guardsmen).

[192] 445 U.S. at 637-38; *see, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 421-24 (1976) (absolute immunity for prosecutors); Pierson v. Ray, 386 U.S. 547, 553-54 (1967) (absolute immunity for judges).

determining that neither of these factors was present,[193] the Court held that municipalities may not assert the good faith of their officials as a defense for injurious conduct under section 1983.[194]

In 1978 the Fifth Circuit decided *Bogard v. Cook*,[195] a section 1983 action filed by a Parchman inmate against supervisory officials in their individual capacities for personal injuries he had suffered at Parchman. Although the court found that Bogard's constitutional rights had been violated,[196] the defendants were protected from damages by their qualified immunity[197] since they were not shown to be personally involved.[198]

The Fifth Circuit in *Bogard* elucidated its view on state officials' qualified immunity.[199] Under the objective test, the court noted that the defendant is liable if he "knew or reasonably should have known" that his conduct, though sincere, violated constitutional rights.[200] Thus, the existence of clearly established rights is essential.[201] Discussing the subjective test, the court stated that the shield of qualified immunity is "pierced only on a showing of misconduct more egregious than ordinary negligence."[202] Nonfeasance as well as misfeasance may be actionable. In either event the plaintiff must show that the defendant's conduct was so grossly negligent that, regardless of his actual intent, he must have desired the harmful results of his action or inaction.[203] Thus, the court reasoned in terms of actual intent rather than in terms of negligence.[204]

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[193] 445 U.S. at 638-50.

[194] *Id.* at 657. The Court noted that municipal officials are still entitled to a qualified immunity from personal damages as long as the official acts in good faith. *Id.*

[195] 586 F.2d 399 (5th Cir. 1978), *cert. denied*, 100 S. Ct. 173 (1979).

[196] 586 F.2d at 420.

[197] *Id.* at 410.

[198] *Id.* at 412.

[199] *See id.* at 411-12.

[200] *Id.* at 411.

[201] *Id.*

[202] *Id.* at 406.

[203] *Id.* at 412.

[204] *Id.*; *see* Jones v. Diamond, 594 F.2d 997, 1035 (5th Cir. 1979) (Rubin, J., concurring in part and dissenting in part) (only negligence required for a § 1983 action, but more required to abrogate official immunity), *rehearing granted*, 602 F.2d 1243 (5th Cir. 1979).

The court in *Bogard* followed *Navarette* and applied a "gross negligence" standard to the subjective "malicious intent" test. However, other decisions cited by the court confused the intent required to establish a cause of action under section 1983 (the nature of the conduct) with the intent required to abrogate qualified immunity (the degree of culpability).[205] The court found that Bogard had been subjected to summary punishments, which, by definition, implied a subjective intent to cause harm.[206] The court refused, however, to equate punishment and intent because to do so "would eliminate qualified immunity in the eighth amendment context."[207]

The year after *Bogard* the Fifth Circuit in *Fiedler v. Bosshard*[208] heard similar claims against county jail officials.[209] In *Bosshard*, the court did equate punishment and intent to award damages, finding that the plaintiffs had shown the callous indifference necessary to establish an eighth amendment cause of action under section 1983.[210] The court stated further that if

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[205] 586 F.2d at 412-15. In determining the prison officials' immunity, the Fifth Circuit cited Burton v. Waller, 502 F.2d 1261, 1274 (5th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975), for the proposition that state officials' liability under § 1983 was no more nor less than that under state law. However, *Burton* discussed intent in the context of stating a cause of action for damages under § 1983. 502 F.2d at 1273-74. The court also compared the duty of a sheriff to exercise reasonable care in the treatment of his prisoners, established in Farmer v. State, 224 Miss. 96, 105, 79 So. 2d 528, 531 (1955) and Mississippi v. Durham, 444 F.2d 152, 157 (5th Cir. 1971), to the scope of immunity afforded a state official. Although a distinction was drawn between the punishment necessary to state a cause of action and the intent required to overcome qualified immunity, the court cited cases which required gross negligence for a cause of action under § 1983 in discussing the gross negligence rquired under the subjective *Wood* test. 586 F.2d at 412 n.7 (citing Burton v. Waller, 502 F.2d 1261, 1274 n.6A (5th Cir. 1974) (question of whether gross negligence is sufficient to state a cause of action under § 1983 left open); Parker v. McKeithen, 488 F.2d 553, 556 (5th Cir.) (gross negligence sufficient to state a cause of action under § 1983), *cert. denied*, 419 U.S. 838 (1974); Roberts v. Williams, 456 F.2d 819, 828 (5th Cir. 1972) (allegation of intent sufficient to state a cause of action under § 1983), *cert. denied*, 404 U.S. 866 (1971)).

[206] 586 F.2d at 420.

[207] *Id.*

[208] 590 F.2d 105 (5th Cir. 1979).

[209] *Id.* at 107; *see* Bogard v. Cook, 405 F. Supp. 1202, 1215 (N.D. Miss. 1975) (state prison warden not held to same standard as county sheriff), *aff'd*, 586 F.2d 399 (5th Cir. 1975), *cert. denied*, 100 S. Ct. 173 (1979).

[210] 590 F.2d at 110; *see, e.g.*, Estelle v. Gamble, 429 U.S. 97, 106 (1976) (deliberate and callous indifference must be shown to establish a § 1983 claim for inadequate medical treatment); McGruder v. Phelps, 608 F.2d 1023, 1025 (5th Cir. 1979) (facts alleging

the plaintiff establishes the requisite indifference, he has also shown the malicious intent necessary to negate immunity.[211] Thus, in this case, the same standard, *i.e.*, "gross negligence," was applied to both the nature of the conduct and the degree of culpability.[212]

In 1979, the Fifth Circuit in *Cruz v. Beto*[213] held Texas prison officials liable for damages for interfering with Cruz's attorney-client relationships with state prisoners.[214] To establish immunity, the lower court placed the burden on defendants to show that their actions were objectively reasonable and undertaken in good faith.[215] The Fifth Circuit agreed with the standard applied by the lower court but held that the burden of proof properly lay with the plaintiffs.[216] The court explained

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confinement for up to 23½ hours per day for monthly periods sufficient to make out a § 1983 action); Reeves v. City of Jackson, 608 F.2d 644, 652 (5th Cir. 1979) (callous and conscious indifference must be established to state an eighth amendment claim under § 1983); Cruz v. Beto, 603 F.2d 1178, 1184 n.2 (5th Cir. 1979) (placing burden on plaintiff consistent with burden for eighth amendment claims); Thomas v. Estelle, 603 F.2d 488, 490 (5th Cir. 1979) (callous, conscious indifference must be shown to state a cause of action under § 1983); Jones v. Diamond, 594 F.2d 997, 1019 (5th Cir.) (deliberate indifference required for eighth amendment violation), *rehearing granted*, 602 F.2d 1243 (5th Cir. 1979); Williams v. Edwards, 547 F.2d 1206, 1211 (5th Cir. 1977) (totality of conditions at state prison violate the eighth amendment); Gates v. Collier, 501 F.2d 1291, 1309 (5th Cir. 1974) (same); Sostre v. McGinnis, 442 F.2d 178, 204-05 (2d Cir. 1971) (damages available under § 1983 for violations of constitutional rights), *cert. denied*, 404 U.S. 1049 (1972); Williams v. Field, 416 F.2d 483, 486 (9th Cir. 1969) (announcing three tests for eighth amendment violations: (1) conduct shocks court's conscience or violates fundamental fairness; (2) punishment is disproportionate to offense; (3) conduct that goes beyond a legitimate penal interest), *cert. denied*, 397 U.S. 1016 (1970); Coleman v. Crisp, 444 F. Supp. 31, 33 (W.D. Okla. 1977) (doctor's being unable to treat eye conditions does not show a callous indifference); James v. Murphy, 392 F. Supp. 641, 644 (M.D. Ala. 1975) (eighth amendment claim should not be dismissed if plaintiff could possibly prove gross negligence from facts).

Arguably plaintiffs need not worry about a county official's intent since political subdivisions are now liable for all injurious conduct under § 1983. *Cf.* Owen v. City of Independence, 445 U.S. at 638 (municipalities may not assert good faith of their officers as a defense under § 1983).

[211] 590 F.2d at 110.

[212] *Id.*

[213] 603 F.2d 1178 (5th Cir. 1979).

[214] *Id.* at 1186.

[215] *Id.* at 1184-85 (citing Procunier v. Navarette, 434 U.S. 555 (1978)); *see* Scheuer v. Rhodes, 416 U.S. 232, 245-50 (1974) (dependents allowed good faith defense in § 1983 action); Pierson v. Ray, 386 U.S. 547, 557-58 (1967) (same).

[216] 603 F.2d at 1184-85; *see* Bogard v. Cook, 586 F.2d 399, 420-21 (5th Cir. 1978)

that requiring the plaintiff to show malicious intent is consistent with establishing a prima facie section 1983 case.[217] Thus, an official is immune unless the plaintiff can show that he or she was not acting in good faith.[218] Finally, the court noted that if good faith were a defense to the common law tort, the defendant could raise it to avoid liability under section 1983.[219]

While the Supreme Court in *Navarette* established that "gross negligence" is required to abrogate a state official's qualified immunity, it did not decide whether simple negligence is enough to state a cause of action under section 1983.[220] Instead, it skirted the issue by finding that no right had been clearly established at the time the action was filed.[221] In *Baker v. McCollan*[222] the Supreme Court again deferred deciding whether simple negligence can give rise to section 1983 liability. In that case, the court of appeals, using a state tort law analysis, found the defendants to be protected by their qualified immunity under *Navarette*.[223] The Supreme Court, however, stated that the first level of inquiry in a section 1983 cause of action is "whether the plaintiff has been deprived of a right secured by the Constitution and laws of the United States."[224] If no such constitutional right exists, the defendant's intent is irrelevant.[225] The Court explained that section 1983 applies where rights protected by the

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(proof of lack of good faith required in § 1983 action), *cert. denied*, 100 S. Ct. 173 (1979).

[217] 603 F.2d at 1184 n.2.

[218] *Id.* at 1183; *see* McNamara v. Moody, 606 F.2d 621, 626 (5th Cir. 1979) (prison officials afforded qualified immunity when acting in good faith); Thomas v. Estelle, 603 F.2d 488, 490 (5th Cir. 1979) (no cause of action under § 1983 unless intent is shown); *cf.* Turner v. Raynes, 611 F.2d 92, 97 (1980) (judge has absolute immunity while acting within his jurisdiction in a § 1983 action).

[219] 603 F.2d at 1184; *see, e.g.*, Owen v. City of Independence, 445 U.S. at 638 (defense is available if it existed at time § 1983 became law); Pierson v. Ray, 386 U.S. 547, 557 (1967) (good faith is available under § 1983 where same protection was available at common law); Roberts v. Williams, 456 F.2d 819, 826 (5th Cir. 1972) (same), *cert. denied*, 404 U.S. 866 (1971); Whirl v. Kern, 407 F.2d 781, 789 (5th Cir.) (same), *cert. denied*, 396 U.S. 901 (1969). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 183 (4th ed. 1971) (immunities of public officials).

[220] 434 U.S. at 560 n.14.

[221] *Id.* at 565.

[222] 443 U.S. 137 (1979).

[223] *Id.* at 142.

[224] *Id.* at 140.

[225] *Id.*

Constitution have been violated, not where duties of care arising out of tort law have been violated. A remedy for violation of traditional tort law must be sought in state court.[226]

Recently, in *Martinez v. California*,[227] the Supreme Court was confronted with the scope of a state parole officer's immunity for the release of a prisoner who subsequently raped and murdered a fifteen year old girl.[228] In this case, a California statute immunized parole board officials from all liability for parole release determinations.[229] The Court agreed that the state statute was constitutional as applied to claims arising under state law.[230] However, the Court held that the statute did not control a federal cause of action, even when asserted in state court.[231] *Martinez* implies that federal law controls immunity claims arising under section 1983,[232] but it does not address the scope of immunity since the plaintiffs did not meet the first level of inquiry established in *Baker*.

B. Respondeat Superior

In 1979, in *Baskin v. Parker*[233] the Fifth Circuit refused to apply state law in a section 1983 action to hold a sheriff vicariously liable for his deputy's wrongdoing.[234] Previously, courts had applied the state law of respondeat superior to section 1983

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[226] *Id.* at 146.

[227] 100 S. Ct. 553 (1980).

[228] *Id.* at 556.

[229] *Id.*

[230] *Id.* at 558.

[231] *Id.*

[232] *Id.* at 558 n.8; *see* Owen v. City of Independence, 445 U.S. at 647 n.30 (immunity under § 1983 is controlled by federal law).

[233] 602 F.2d 1205 (5th Cir. 1979) (per curiam).

[234] *See* Rizzo v. Goode, 423 U.S. 362, 371 (1976) (unless shown to be personally involved, a mayor is not liable for city employee's actions under § 1983); Watson v. Interstate Cas. Co., 611 F.2d 120, 123 (5th Cir. 1980) (citing Baskin v. Parker, 602 F.2d 1205, 1208 (5th Cir. 1979) (sheriff not vicariously liable under § 1983)); Johnson v. Shaw, 609 F.2d 124, 125-26 (5th Cir. 1980) (per curiam) (citing *Baskin*) (unless shown to be personally involved, state prison warden is not liable for deputies' actions under § 1983); Dailey v. Byrnes, 605 F.2d 858, 860-62 (5th Cir. 1979) (sheriff not vicariously liable under *Baskin*); Cotton v. Hutto, 577 F.2d 453, 455 (8th Cir. 1978) (respondeat superior not available against state prison warden); Landman v. Royster, 354 F. Supp. 1302, 1316 (E.D. Va. 1973) (requirement of superior's personal involvement met when he personally directs subordinate to act, or when superior acquiesces in those acts).

actions,[235] but in 1978 the Supreme Court in *Monell v. Department of Social Services*[236] held that a city could be held liable under section 1983 for its constitutional violations if the injury resulted from an action by a city official or pursuant to an official policy.[237] Finally, the court in *Baskin* found that *Monell* had rejected the doctrine of respondeat superior as a basis for recovery under section 1983 to prevent the development of *lex loci*.[238]

V. Relief

Section 1983 states that every person who deprives another person of his constitutional rights "shall be liable." The statute, however, is silent as to the kinds of damages available for such deprivation.[239] Pursuant to section 1988, federal law is only controlling in civil rights suits so far as such laws are suitable "to carry into effect the laws of the United States."[240] When federal law is "not adapted to [that] object, or [is] deficient," then state law is applied. In *Carey v. Piphus*,[241] the Supreme Court articulated a standard for determining when state tort rules of damages are applied. "When interests protected by the common law of torts closely parallel constitutional rights,"[242] then state law governs. When the common law and constitutional interests are

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[235] *See, e.g.*, Taylor v. Gibson, 529 F.2d 709, 716 (5th Cir. 1976) (sheriff liable under respondeat superior for deputies' actions under § 1983 in certain circumstances); Carter v. Estelle, 519 F.2d 1136, 1136 (5th Cir. 1975) (per curiam) (prison administrators may under certain circumstances be held liable for the acts of their subordinates); Tuley v. Heyd, 482 F.2d 590, 594 (5th Cir. 1973) (sheriff's vicarious liability under § 1983 is controlled by state law); Madison v. Gerstein, 440 F.2d 338, 341 (5th Cir. 1971) (sheriff liable under respondeat superior for deputies' actions under § 1983 in certain circumstances); Lewis v. Bratigam, 227 F.2d 124, 128 (5th Cir. 1955) (under state law the acts of the deputy may be imputed to the sheriff).

[236] 436 U.S. 658 (1978).

[237] *Id.* at 691.

[238] 602 F.2d at 1208. *But see* Johnson v. Duffy, 588 F.2d 740, 744 (9th Cir. 1978) (if a public official is vicariously liable for the acts of his subordinates under state law, he can be vicariously liable under § 1983).

[239] *See* note 167 *supra*; Carey v. Piphus, 435 U.S. 247, 254 (1979) (basic purpose of § 1983 is to compensate persons for injuries caused by deprivation of constitutional rights); Basista v. Weir, 340 F.2d 74, 85 (3d Cir. 1965) (§ 1983 silent as to damages).

[240] 42 U.S.C. § 1988 (1976).

[241] 435 U.S. 247 (1978).

[242] *Id.* at 258. In this case, students who were suspended from public schools had to show actual proof of damages to recover for violation of procedural due process. *Id.*

not parallel, however, then the common law rules of damages must be carefully adapted to ensure adequate compensation.[243] Thus, both federal and state rules of damages are utilized to ensure that compensation is tailored to the particular deprivation.[244]

To justify a damage award, the plaintiff must prove that the defendant had knowledge of or participated in unconstitutional conduct.[245] Proof of damages may depend on the nature of the interest protected.[246] Although nominal, compensatory and punitive damages may be recovered,[247] the courts are more reluctant to award punitive damages. Therefore, malicious conduct or gross disregard of constitutional rights is required.[248]

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[243] *Id.*

[244] *Id.* at 258-59; *see* Cruz v. Beto, 603 F.2d 1178, 1186 (5th Cir. 1979) (recovery limited to abuse of discretion).

[245] Thomas v. Estelle, 603 F.2d 488, 490 (5th Cir. 1979); *see* notes 165 through 238 and accompanying text *supra.*

[246] *See* Carey v. Piphus, 435 U.S. 247, 248, 253-54 (1978) (unless plaintiffs prove they were actually injured, they are only entitled to nominal damages for deprivation of procedural due process); Simineo v. School Dist., 594 F.2d 1353, 1357 (10th Cir. 1979) (per curiam) (compensatory and punitive damages awarded for school teacher's denial of automatic salary increase, termination without procedural due process and termination for exercising first amendment rights); Bradshaw v. Zoological Soc'y, 569 F.2d 1066, 1068 (9th Cir. 1978) (affirming an award of punitive damages for sex discrimination); Landman v. Royster, 354 F. Supp. 1302, 1318 (E.D. Va. 1973) (compensatory damages awarded for cruel and unusual punishment).

[247] *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 248, 253-54 (1978) (nominal and compensatory damages allowable under § 1983); Simineo v. School Dist., 594 F.2d 1353, 1357 (10th Cir. 1979) (per curiam) (compensatory and punitive damages allowable under § 1983); Bradshaw v. Zoological Soc'y, 569 F.2d 1066, 1068 (9th Cir. 1978) (punitive damages allowable under § 1983); *cf.* Johnson v. Railway Express, 421 U.S. 454, 460 (1975) (punitive damages may be awarded under 42 U.S.C. § 1981 (1976)).

[248] *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 233 (1970) (Brennan, J., concurring in part, dissenting in part) (punitive damages may be recovered upon showing that: (1) defendant acted under color of state law with actual knowledge that he was violating a constitutional right; or (2) defendant acted with reckless disregard of plaintiff's constitutional rights); Carter v. Estelle, 519 F.2d 1136, 1137 (5th Cir. 1975) (per curiam) (prisoner may be awarded compensatory and punitive damages for wrongful confiscation or loss of his property by prison officials); Sostre v. McGinnis, 442 F.2d 178, 204-05 (2d Cir. 1971) (punitive damages may be awarded for unjustifiable violations of constitutional rights), *cert. denied,* 404 U.S. 1049 (1972); United States *ex rel.* Motley v. Rundle, 340 F. Supp. 807, 811 (E.D. Pa. 1972) (punitive damages awarded only upon a showing of malicious action in gross disregard of plaintiff's rights); *cf.* Milner Hotels v. Brent, 207 Miss. 892, 899, 43 So. 2d 654, 655 (1950) (punitive damages awarded if the wrongful act was: (1) intentionally done; and (2) in gross disregard of plaintiff's rights).

Examples of damage awards in the prison context demonstrate that transforming a constitutional deprivation into a monetary award may be difficult. In *Cruz v. Beto*,[249] for interference with attorney-client relationships, the court awarded $9,291.00 to twelve inmates for humiliation and deprivation. The attorney in *Cruz* was awarded $1,000 for humiliation, embarassment, and improper deprivation of her constitutional rights.[250] In *Landman v. Royster*,[251] a Virginia federal district court compensated the plaintiff for wrongful detention in solitary confinement in the amount of $15,303.20.[252] The award was based on pain and suffering, reasonable costs for medical treatment, and lost prison wages.[253] The inmate also requested damages for wages he could have earned had he been released on parole.[254] The court, however, found potential "outside" wages too difficult to assess.[255]

As a matter of policy, federal courts are hesitant to enjoin prison administration and discipline since they are ill-equipped to oversee them.[256] In *Hutto v. Finney*,[257] the district court of

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In Fielder v. Bosshard, 590 F.2d 105 (5th Cir. 1979), the court found that in suits alleging cruel and unusual punishment, punitive damages are necessarily justified since "the jury must find egregious conduct capable of supporting an award of punitive damages" in order to find cruel and unusual punishment. *Id.* at 111. *Compare* Campise v. Hamilton, 382 F. Supp. 172, 186 (S.D. Tex. 1974) (showing of actual damages not necessary to recover punitive damages), *appeal dismissed*, 541 F.2d 279 (5th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977) *with* Ross v. Deposit Guar. Nat'l Bank, 400 F. Supp. 45, 52 (S.D. Miss. 1974) (no punitive damages without proof of actual damages) *and* McCain v. Cochran, 153 Miss. 237, 275, 120 So. 823, 828 (1929) (same).

[249] 603 F.2d 1178 (5th Cir. 1979).

[250] *Id.* at 1186; *see* Baskin v. Parker, 602 F.2d 1205, 1209-10 (5th Cir. 1979) (per curiam)(remanded for consideration of damages for personal humiliation, embarrassment and mental distress due to illegal arrest).

[251] 354 F. Supp. 1302 (E.D. Va. 1973).

[252] *Id.* at 1319.

[253] *Id.* For other cases awarding damages for lost prison wages, see Neal v. Wolfe, 346 F. Supp. 569, 576 (E.D. Pa. 1972); Motley v. Rundle, 340 F. Supp. 807, 810 (E.D. Pa. 1972).

[254] 354 F. Supp. at 1319.

[255] *Id.*

[256] *See* Bell v. Wolfish, 441 U.S. 520, 547 n.29 (1979) (courts should afford jail administrators wide deference in prescribing discipline since courts are ill-equipped to deal with these matters); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 128 (1977) (courts should afford prison officials wide deference in administration); McGruder v. Phelps, 608 F.2d 1023, 1026 (5th Cir. 1979) (prison officials must have broad discretion, free from judicial interference, in classifying prisoners' custodial status); Cruz v. Beto, 603 F.2d 1178, 1185 (5th Cir. 1979) (prison officials have broad discretion in gov-

Arkansas held four hearings over a period of several years before ordering the Arkansas Department of Corrections to make specific improvements.[258] The first *Gates v. Collier*[259] decision marked the beginning of massive federal intervention in state prisons. Since that time, federal courts have issued injunctions ordering state prison systems to compile and publish disciplinary regulations,[260] close delapidated housing facilities,[261] close the prison to incoming prisoners until overcrowding is reduced,[262] classify and separate dangerous prisoners,[263] provide access to the courts,[264] and comply with detailed mail regulations.[265]

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erning prisoners which may include banning of disruptive attorneys and classifying of prisoners); Preston v. Thompson, 589 F.2d 300, 303 (7th Cir. 1978) (courts should be hesitant to enjoin prison officials unless prisoners' constitutional rights are being violated); Auld v. Foster, 485 F.2d 945, 946 (5th Cir. 1973) (same).

In *Wolfish*, the Court noted that although previous cases dealt with convicted inmates, the principle of deference also applies to pretrial detainees. 441 U.S. at 547 n.29.

[257] 437 U.S. 678 (1978).

[258] *Id.* at 648.

[259] 349 F. Supp. 881, 898-905 (N.D. Miss. 1972), *aff'd in part and modified in part*, 501 F.2d 1291, 1303-04 (5th Cir. 1974).

[260] Gates v. Collier, 606 F.2d 115, 115 (5th Cir. 1979).

[261] Inmates of Henry County Jail v. Parham, 430 F. Supp. 304, 307 (N.D. Ga. 1976) (county jail closed for unconstitutional conditions).

[262] Pugh v. Lock, 406 F. Supp. 318, 322 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *cf.* Costello v. Wainwright, 397 F. Supp. 20, 34 (M.D. Fla. 1975) (ordered prison population reduced in stages), *aff'd*, 525 F.2d 1239 (5th Cir. 1976).

[263] *See, e.g.*, McCray v. Sullivan, 509 F.2d 1332, 1334 (5th Cir. 1975) (prison officials may be required to protect prisoners from other dangerous prisoners), *cert. denied*, 423 U.S. 859 (1975); Gates v. Collier, 501 F.2d 1291, 1308-10 (5th Cir. 1974) (inmates should be assigned to barracks according to the severity of their offense); Young v. Wainwright, 449 F.2d 338, 339 (5th Cir. 1971) (except in extreme circumstances, courts are reluctant to require classification and segregation of prisoners); Holt v. Sarvers, 309 F. Supp. 362, 384 (E.D. Ark. 1970) (prison official ordered to exercise more care in assigning men to barracks), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

[264] *See* notes 60 through 96 and accompanying text *supra*.

[265] *See* Wolff v. McDonnell, 418 U.S. 529, 576-77 (1974) (mail censorship must be accompanied by minimum procedural safeguards); Procunier v. Martinez, 416 U.S. 396, 417 (1974) (same); Guajardo v. Estelle, 580 F.2d 748, 753-63 (5th Cir. 1978) (same); McCray v. Sullivan, 509 F.2d 1332, 1336 (5th Cir. 1975) (case remanded to be determined in light of *Wolff* and *Martinez*).

VI. County Jails and Pretrial Detainees

As demonstrated above, a state's potential liability for unconstitutional prison conditions is considerable; however, a county's potential liability is even greater. The Supreme Court in *Monell v. Department of Social Services*[266] held that local governmental units are "persons" within the meaning of section 1983[267] and may therefore be liable for constitutional deprivations caused pursuant to an official governmental policy.[268] According to the Court, this policy need not be formally approved if it is a "custom or usage" of the governing body.[269] The Court also held that absent a formal policy or a "custom or usage," local governments are not liable for the constitutional torts of their employees solely on the basis of respondeat superior.[270]

Although *Monell* did not determine the scope of local governments' immunity, the Court addressed that issue two years later in *Owen v. City of Independence*.[271] In this case, the city asserted its officials' good faith as a defense under section 1983.[272] The Court announced that immunity under section 1983 is allowed only where strong public policy supports it, or where the immunity was firmly rooted in the common law prior to the

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[266] 436 U.S. 658 (1978).

[267] *Id.* at 663. By rereading the legislative history of § 1983, the Court in *Monell* overruled that part of Monroe v. Pape, 365 U.S. 167, 181 (1961), which held that cities were not "persons" and were therefore wholly immune from suit under § 1983. 436 U.S. at 663-90. For a thorough discussion of the meaning of "person", see Annot., 56 L. Ed. 2d 895, 897-915 (1978).

[268] 436 U.S. at 691-92.

[269] *Id.*; *see* Rizzo v. Goode, 423 U.S. 362, 371 (1976) (must be affirmative link between misconduct and official policy); Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-73 (1970) (informal practices amounting to custom or usage has the force of law); Nashville C. & St. L. Ry. v. Browning, 310 U.S. 362, 367 (1940) (practice must have been continous and pervasive).

[270] 436 U.S. at 663 n.7, 692; *see* Heath v. Redbud Hosp. Dist., 620 F.2d 207, 209 (9th Cir. 1980) (*Monell* precludes liability based exclusively upon respondeat superior); Reeves v. City of Jackson, 508 F.2d 644, 654 (5th Cir. 1979) (city not liable solely on the basis of respondeat superior); Baskin v. Parker, 602 F.2d 1205, 1206 (5th Cir. 1979) (municipal employee's actions must be taken pursuant to official policy). For a more detailed discussion of respondeat superior under § 1983, see notes 233 through 238 and accompanying text *supra*.

[271] 445 U.S. 622 (1980). For a thorough treatment of *Owen*, see pages 139 through 153 *infra*.

[272] 445 U.S. at 624-25.

enactment of section 1983.[273] Since the good faith defense did not fall within either exception,[274] the Court held that municipalities have no immunity from liability resulting from its officers' unconstitutional conduct.[275]

Potential liability of local officials has been exacerbated even further by the fact that they must deal with three classes of prisoners: (1) state prisoners awaiting transfer to Parchman who are protected by the eighth amendment and to whom *Gates* orders could be extended; (2) local prisoners serving misdemeanor sentences who are protected by the eighth amendment and state statutes;[276] and (3) pretrial detainees who are still protected by the fourteenth amendment.[277]

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[273] *Id.* at 638.

[274] *Id.* at 638-56.

[275] *Id.* at 657.

[276] *See, e.g.*, Dailey v. Byrnes, 605 F.2d 858, 861 (5th Cir. 1979) (liability for cruel and unusual punishment must rest on a showing of callous, deliberate indifference); Taylor v. Sterrett, 600 F.2d 1135, 1141 (5th Cir. 1979) (court ordered wide-ranging relief of county jail conditions for violations of state law); Fielder v. Bosshard, 590 F.2d 105, 107-09 (5th Cir. 1979) (citing Estelle v. Gamble, 428 U.S. 97 (1976)) (sheriff's liability for cruel and unusual punishment rests upon a showing of callous indifference to serious needs); Robinson v. Jordan, 494 F.2d 793, 795 (5th Cir. 1974) (per curiam) (doctor held liable under his statutory duty to provide medical care to county prisoners when his gross misconduct caused severe permanent bodily injury); Roberts v. Williams, 456 F.2d 819, 827 (5th Cir. 1972) (county prisoner must establish conscious purpose to inflict suffering or callous indifference to show eighth amendment violation). For examples of Mississippi statutes protecting prisoners, see MISS. CODE ANN. § 19-25-35 (1972) (sheriff's duty to keep safely prisoners in his custody); *id.*-69 (sheriff must keep jail in clean and comfortable condition; if he willfully neglects or refuses, the governor is empowered to remove the sheriff); *id.* -71 (jailer to maintain separate facilities for sexes, provide daily wholesome and sufficient food, adequate lighting and clean bedding); *id.* -73 to -74 (Supp. 1979) (provides alternative methods for funding feeding of prisoners and keeping a log of meals served); *id.* § 47-1-27 (1972) (official guard, or employee of sheriff who mistreats or abuses convict or permits it to be done, or who willfully fails to provide sufficient and wholesome food, clothing, shelter, bathing facilities, or medical attention to inmate, shall be guilty of a misdemeanor); *id.* -29 (complaints by convicts are to be investigated by the county board of supervisors); *id.* -57 (inmate in need of medical attention shall be immediately examined by the sheriff who shall call a doctor if he deems it necessary); *id.* -59 (expenses of guarding inmates while in hospital paid from general county funds); *id.* § 19-5-1 (county board of supervisors has duty to inspect jail at least once every three months in regard to safety, sufficiency, and accommodation of prisoners; board has power to fine sheriff for neglect of his duties); *id.* 19-3-41 (board of supervisors required to erect and maintain jail in good repair); *id.* 19-25-19 (all sheriffs shall be liable for acts of deputies).

[277] *See* Bell v. Wolfish, 441 U.S. 520, 536-37 (1979) (pretrial detainees cannot be

In 1979 the Supreme Court decided *Bell v. Wolfish*,[278] a class action challenging conditions of confinement in a federally operated short-term detention center for pretrial detainees.[279] In this case, the defendants contended that the plaintiffs lacked standing since all of them had been transferred or released from the facility by the time the case was heard.[280] The Court held that a case or controversy existed at the time the case was filed and when the class was certified.[281] Thus, the class consisting of both present and future inmates had standing to sue even though the class representatives' claim had been terminated since unnamed members of the class could still be subjected to the contested conditions.[282] Further, the violations at issue were "capable of repetition, yet evading review" because of the temporary nature of the confinement.[283] Therefore, the case remained viable.[284]

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subjected to conditions constituting punishment without due process); Jones v. Diamond, 594 F.2d 997, 1003 (5th Cir.) (confinement conditions of pretrial detainees may be analyzed as due process deprivation rather than as cruel and unusual punishment), *rehearing granted*, 602 F.2d 1254 (5th Cir. 1979); McMahon v. Beard, 583 F.2d 172, 174-75 (5th Cir. 1978) (solitary confinement in "strip cell" when prisoner is charged with murder not violative of constitutional rights); Miller v. Carson, 563 F.2d 741, 744-45 (5th Cir. 1977) (pretrial detainees should not be subjected to any hardships other than those absolutely necessary for confinement); Mitchell v. Untreiner, 421 F. Supp. 886, 893 (N.D. Fla. 1976) (pretrial detainee retains all rights of an ordinary citizen except those expressly or impliedly taken from him by law).

[278] 441 U.S. 520 (1979).

[279] *Id.* at 523. The New York Metropolitan Corrections Center was described by the Court as most advanced and innovative. *Id.* at 525. The plaintiffs challenged overcrowding, inadequate recreation, strip searches and other improper searches. *Id.* at 527.

[280] *Id.* at 526 n.5.

[281] *Id.*

[282] *Id.* Even though the suit might become moot as to the named plaintiff, the constitutional issue can still be decided if the plaintiff certifies himself as a representative of a class. To do this, the plaintiff must have a case and controversy when the complaint is filed, and when the class is certified. Sosna v. Iowa, 419 U.S. 393, 402 (1975). Then if the named plaintiff's claim becomes moot, the controversy will continue between the named defendants and the members of the class.

[283] *See* Sosna v. Iowa, 419 U.S. 393, 399-400 (1975) (controversy not moot where question presented is capable of repetition, yet evading review); United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953) (the public interest in having the legality of practices settled militates against a mootness conclusion); Satterwhite v. City of Greenville, 578 F.2d 987, 995 (5th Cir. 1978) (application of the mootness doctrine in class action context depends on the idiosyncrasies of each case).

[284] 441 U.S. at 526 n.5.

Similar mootness problems appeared in *Jones v. Diamond*.[285] The district court denied the plaintiff relief and the appeal of Jones' personal claims was denied as untimely. However, the appeal of the class claims was timely.[286] Although Jones' personal claims were moot, the Fifth Circuit allowed him to represent the class on appeal since he retained "a sufficient homogeneity of interest at every moment of the litigation."[287]

The Supreme Court in *Wolfish* also announced guidelines for determining whether pretrial detainees' constitutional rights have been violated. The Second Circuit had reasoned that since pretrial detainees were "presumed innocent" they retained the rights of unincarcerated persons.[288] Thus, the court required that pretrial detainees only be subjected to restrictions inherent in their confinement or to restrictions based on a compelling necessity of jail administration.[289] The Supreme Court, however, held that the "presumption of innocence" defines the burden of proof in criminal cases and is not a source for the compelling necessity test used by the court below.[290] To determine whether a pretrial detainee's rights have been violated, the Court stated that the proper inquiry is whether the conditions amount to punishment[291] on the basis of the following test:

> Whether the sanction involves an affirmative disability of restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for

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[285] 594 F.2d 997 (5th Cir.), *rehearing granted*, 602 F.2d 1243 (5th Cir. 1979).

[286] 594 F.2d at 1004-05.

[287] *Id.* at 1005.

[288] 441 U.S. at 531.

[289] *Id.*; *see* Miller v. Carson, 563 F.2d 741, 747 (5th Cir. 1977) (pretrial detainees are not to be subjected to any hardships except those necessary for the purpose of confinement only); Mitchell v. Untreiner, 421 F. Supp. 886, 893 (N.D. Fla. 1976) (pretrial detainees retain all rights accorded arrestees released on bail, except for curtailment of mobility to secure presence at trial and to protect jail security).

[290] 441 U.S. at 532-33.

[291] *Id.* at 535 n.16; *see* McMahon v. Beard, 583 F.2d 172, 174 (5th Cir. 1978) (punitive measures imposed on prisoners are not to be imposed on pretrial detainees).

> it, and whether it appears excessive in relation to the alternative purpose assigned. . . .[292]

Thus, pretrial detainees do not possess the same freedoms as the unincarcerated. Some valid objectives justifying imposition of restrictions include: ensuring presence at trial, effective management of a facility, jail security, and preservation of internal order and discipline.[293] Furthermore, the Court warned that courts ordinarily should defer to the expertise of correctional officials in determining whether restrictions are reasonably related to legitimate governmental objectives.[294]

In dissent, Justice Marshall argued that the majority's test coupled with deference to prison officials would allow officials to impose almost any restrictions.[295] More fundamentally, Justice Marshall reasoned that the proper inquiry should be whether the governmental interest outweighs the individual deprivation as in other due process cases, not whether the practice constitutes "punishment."[296]

Judge Rubin's dissent in *Jones* echoed Justice Marshall's response in *Wolfish*, stating that the language of section 1983 does not restrict its protection to intentional invasions.[297] The majority in *Jones* held that the plaintiff must show that prison authorities acted with "deliberate and callous indifference," a higher standard than that of simple negligence.[298] Judge Rubin believed the court thus refused to differentiate between the standards applicable to pretrial detainees and convicted persons, or between the nature of the conduct required to establish liability and the degree of culpability required to justify a damage award.[299]

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[292] 441 U.S. at 527-38 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)). After quoting *Kennedy*, the Court explained that absent a showing of an official's express intent to punish, the question of whether a practice is punishment turns on whether the purpose of the restriction is punitive or whether the restriction is incidental to a legitimate governmental purpose. 441 U.S. at 539.

[293] 441 U.S. at 540.

[294] *Id.* at 540 n.23.

[295] *Id.* at 563 (Marshall, J., dissenting).

[296] *Id.* at 563-64 (Marshall, J., dissenting).

[297] 594 F.2d at 1035 (Rubin, J., concurring in part and dissenting in part).

[298] *Id.* at 1003-04.

[299] *Id.* at 1035 (Rubin, J., concurring in part and dissenting in part).

VII. CONCLUSION

The plaintiffs in *Jones* attacked every facet of the Jackson County Jail.[300] The panel reviewed the standards applicable to every area of county jail operation, although it granted relief in only limited circumstances.[301] The court indicated that state prison standards are applicable to county jails through the state prisoners housed there; however, it refused to require Jackson County officials to comply with all requirements since "[i]t is the State which is responsible for the backlog of convicted criminals in the county jail. The convicts are state prisoners, not county prisoners."[302] Further action against appropriate state officials to exact compliance was not precluded.[303]

State and local authorities are primarily responsible for curing constitutional violations.[304] But frequently those authorities must be compelled to act by the courts. Federal courts have expressed a reluctance to intervene in the operations of state and local jails.[305] State courts, therefore, are the logical avenue for enforcement of constitutional rights on a local level. The United States Supreme Court has recognized repeatedly that state courts have the duty to enforce federally created rights.[306] Thus,

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[300] *Id.* at 1003-04. They attacked: (1) lack of recreation, (2) overcrowding, (3) lack of adequate medical care, (4) visitation rules, (5) utilization of trustees, (6) racial segregation, (7) lack of an adequate diet, (8) communicative censorship, (9) lack of fair disciplinary proceedings, (10) classification system, (11) inmate security procedures, (12) physical facilities, and (13) lack of access to the courts. *Id.* at 1005-06. The final order enjoined racial segregation, limited the number of convicts to be housed in a new jail, ordered the defendants to submit a plan for noncontact visitation, and vacated an order requiring the defendants to post a list of "prisoner's rights." *Id.* at 1029-30.

[301] *Id.* at 1011-22.

[302] *Id.* at 1024-25. The court rejected the prisoners' claim that Bounds v. Smith, 430 U.S. 817 (1977), holding that the constitutional right of access to the courts required state prison authorities to provide prisoners with adequate law libraries or with assistance from persons trained in law, was applicable to county jails. 594 F.2d at 1024.

[303] 594 F.2d at 1025.

[304] *See* Milliken v. Bradley, 433 U.S. 267, 281 (1977) (local school authorities have responsibility for solving constitutional violations); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) (same).

[305] *See* note 5 and accompanying text *supra*.

[306] *See, e.g.*, Martinez v. California, 100 S. Ct. 553, 558 n.7. (1980) (if Congress provides no remedy for federally created action, an aggrieved party may still enforce the action in state court); Testa v. Katt, 330 U.S. 386, 389-91 (1947) (states have obligation to enforce federal laws); Mondon v. New York, N.H. & H.R.R., 223 U.S. 1, 55-58 (1912)

state courts have concurrent jurisdiction over section 1983 claims.[307] Of equal importance, they are the sole forum for the enforcement of duties arising under state law,[308] and they provide a hope for potential recovery under the doctrine of respondeat superior, which is no longer available under section 1983.[309]

County jails are indeed a matter of local concern. Whether compliance is voluntary or exacted by court order, local taxpayers are ultimately strapped with the cost of providing constitutionally minimum facilities. It is hoped that *Jones* will establish uniform guidelines for county jails throughout the Fifth Circuit. Therefore, local authorities should be encouraged to spare taxpayers the additional expense of litigation and to comply voluntarily with constitutional mandates and state law.

Mary Elizabeth Hall
Ann W. Moore

(rights arising under a congressional act may be enforced by state courts); Chaflin v. Houseman, 93 U.S. 130, 136-37 (1876) (state courts have concurrent jurisdiction where exclusive federal jurisdiction is neither express nor implied); Lewis v. Delta Loans, Inc., 300 So. 2d 142, 144-45 (Miss. 1974) (state and federal courts may exercise concurrent jurisdiction over rights created under federal law); Masonite Corp. v. International Woodworkers of Am., 215 So. 2d 691, 695 (Miss. 1968) (state has concurrent jurisdiction over Labor Management Relations Act), *cert. denied*, 394 U.S. 974 (1969); Keohring Co. v. Hyde Constr. Co., 254 Miss. 214, 229, 178 So. 2d 838, 842-43 (1965) (where state courts have long enjoyed jurisdiction over subject matter of an action, jurisdiction is not withdrawn by federal statute unless such intention is distinctly manifest).

[307] *See, e.g.*, Martinez v. California, 100 S. Ct. 553, 558 n.7 (1980) (state court may entertain § 1983 action where some type of claim would be enforced in the state's courts); Long v. District of Columbia, 469 F.2d 927, 937 n.4 (D.C. Cir. 1972) (Congress has generally chosen to grant concurrent jurisdiction in private civil actions and if a federal statute contains no express provision to the contrary, concurrent jurisdiction may be presumed); Hofferber v. First Nat'l Bank, 437 F. Supp. 788, 791 (W.D. Okla. 1977) (concurrent jurisdiction under Civil Rights Act); Young v. Board of Educ., 416 F. Supp. 1139, 1140-41 (D. Colo. 1976) (same); Alvarez v. Wiley, 71 Cal. App. 3d 599, 139 Cal. Rptr. 550, 553-54 (1977) (same); Holt v. City of Troy, 78 Misc. 2d 9, 355 N.Y.S.2d 94-96 (1974) (same); Kish v. Wright, 562 P.2d 625, 626-27 (Utah 1977) (same).

[308] *See* note 279 *supra*.

[309] For example, the Mississippi statute, MISS. CODE ANN. § 19-25-19 (1972), provides in pertinent part: "all sheriffs shall be liable for the acts of their deputies, and for money collected by them." *Accord*, Poole v. Maryland Cas. Co., 380 So. 2d 238, 239 (Miss. 1980) (plaintiff obtained judgment against sheriff for injuries resulting from an accident with sheriff's deputy).

*Editor's note: Since the time this Comment was prepared for publication, the Fifth Circuit en banc heard *Jones v. Diamond* and the United States Supreme Court granted the petition for writ of certiorari. Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981), *cert.*

granted sub nom. Ledbetter v. Jones, 49 U.S.L.W. 3946 (June 23, 1981) (No. 80-1804). In addition the Supreme Court held in Rhodes v. Chapman, 49 U.S.L.W. 4677 (June 16, 1981), that placing two inmates in a cell designed for one does not violate the prohibition against cruel and unusual punishment under the 8th and 14th amendments, if it does not constitute wanton or necessary infliction of pain, nor subject an inmate to conditions grossly disproportionate to the severity of the crime.

CONVERGENCE OF THE COPYRIGHT LAW AND THE SHERMAN ACT

Because of the broad scope of trade regulation under the federal antitrust laws,[1] conflicts between the policy or substance of the antitrust laws and other areas of federal law are not uncommon. The patent and copyright laws are particular areas of federal law that contain a potential for conflict with the antitrust laws. When the grant of monopoly rights under both the patent and copyright laws[2] is contrasted with the underlying antitrust policy of suppressing anticompetitive activity,[3] this potential for conflict becomes readily apparent. Of all federal antitrust laws, the Sherman Act[4] is most frequently the source of conflict with the copyright and patent laws. Accordingly, the antitrust aspects of this comment will be limited to the Sherman Act. Although analogies will be drawn between the patent and copyright laws in relation to the Sherman Act, an extensive discussion of the relationship between the patent laws and the antitrust laws is beyond the scope of this comment.[5]

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[1] The federal antitrust laws consist of the following statutes: Sherman Act, 15 U.S.C. §§ 1-7 (1976); Clayton Act, *id.* §§ 12-27; Robinson-Patman Act, *id.* §§ 13-13b, 21a; Federal Trade Commission Act, *id.* §§ 41-58. Section 1 of the Clayton Act defines the Sherman, Clayton, and Robinson-Patman Acts to be "antitrust laws;" however, the Federal Trade Commission Act is not an "antitrust law" as defined by that section. *Id.* § 12. See notes 24 and 25 *infra* for the text of §§ 1 and 2, respectively, of the Sherman Act.

[2] The owner of a patent has the right to "exclude others from making, using, or selling the invention throughout the United States." 35 U.S.C. § 154 (1976). Likewise, the copyright owner has the exclusive right to reproduce, publish, perform, and display the copyrighted article. 17 U.S.C. § 106 (1976).

[3] *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 4-5 (1958) (Sherman Act aimed at preserving free competition).

[4] 15 U.S.C. §§ 1-7 (1976).

[5] Much has been written on the relationship between patent and antitrust laws. *See generally* O. BARNETT, PATENT PROPERTY AND THE ANTI-MONOPOLY LAWS (1943); W. BOWMAN, PATENT AND ANTI-TRUST LAW (1973); Keating, *The Patent Monopoly versus Anti-Trust Activism—Open Warfare or Armed Truce?*, 77 DICK. L. REV. 1 (1979); Oppenheim, *Patents and Antitrust: Peaceful Co-existence?*, 54 MICH. L. REV. 199 (1955); Turner, *The Patent System and Competitive Policy*, 44 N.Y.U. L. REV. 450 (1969).

I. THE COPYRIGHT LAW OF THE UNITED STATES

The United States Constitution grants to Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[6] Congress enacted patent and copyright laws pursuant to this clause.[7] The copyright law affords protection to an author's original works that are fixed in any tangible medium of expression.[8] The protection provided to the owner of the copyright consists of the exclusive rights to reproduce, distribute, display, and prepare derivative works based on the copyrighted article.[9] In addition, when the copyright is on a musical composition, choreographic work, or dramatic work, the copyright owner has the exclusive right to perform the work publicly for a profit.[10] Thus, the copyright owner has a legal monopoly with respect to the particular copyrighted work. However, the monopoly grant is limited by the copyright law in several respects.[11] For example, the dura-

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[6] U.S. CONST. art. 1, § 8, cl. 8. For a discussion of the background of copyright protection in the United States, see B. BUGBEE, THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW (1967); LIBRARY OF CONGRESS, COPYRIGHT IN CONGRESS 1789-1904 (Solberg ed. 1905).

[7] The present Patent Code may be found at 35 U.S.C. §§ 1-375 (1976 & Supp. III 1979). The present Copyright Code may be found at 17 U.S.C. §§ 101-810 (1976 & Supp. III 1979). The latter was a major revision of the Copyright Act, the first since 1909. Pub. L. No. 95-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (1976 & Supp. III 1979)). *See generally Copyright Symposium* (pts.1-2), 22 N.Y.L.S. L. REV. 193-292 (1976) and 471-678 (1977) (review of new Copyright Act).

[8] 17 U.S.C. § 102(a) (1976). The tangible medium of expression may be "now known or later developed." *Id.* If the work is fixed to the medium of expression so that the work may be "perceived, reproduced, or otherwise communicated," either directly or with the aid of a machine or device, it is entitled to copyright protection. *Id.* The statute lists several types of works to which copyright protection extends. These include: literature, music and dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and audiovisual works; and sound recordings. *Id.* However, the ideas, concepts, or principles embodied in the work of authorship are not protected by the copyright. *Id.* § 102(b). *See* H. HOWELL, THE COPYRIGHT LAW 10-44 (1948) (copyrightable material).

[9] 17 U.S.C. § 106 (1976).

[10] *Id.* For a discussion of common law rights in unpublished works, see E. DRONE, LAW OF COPYRIGHT 97-136 (1879).

[11] 17 U.S.C. §§ 107-118 (1976). Limitations on exclusive rights include: fair use, *id.* § 107; reproduction by libraries and archives, *id.* § 108; sale or display of particular copies by the owner, *id.* § 109; performance or display for educational, religious, or non-

tion of the exclusive rights is limited by statute.[12] Thus, the monopoly grant is not a pure monopoly in the classic economic sense. The Copyright Act provides that any exclusive rights embodied in a copyright or any subdivision of the exclusive rights may be transferred and separately owned.[13] Upon transfer, the transferee is entitled to the same protection and remedies as the original copyright owner.[14] A license, however, is distinguished from an assignment of complete ownership of the copyright.[15] In the latter, the ownership of the copyright is vested in the assignee, while in the former, the licensee merely acquires a right to use the copyright in a manner designated in the license agreement.[16]

The Copyright Act refers to both exclusive and nonexclusive licenses.[17] When an exclusive license is granted, the licensee is

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profit purposes, *id.* § 110; certain secondary transmissions, *id.* § 111; ephemeral recordings, *id.* § 112; the making, distribution, or display of pictures or photographs of pictorial, graphic, and sculptural works, *id.* § 113.

[12] Prior to the enactment of the 1976 Copyright Act, a copyright secured under the federal copyright law had a duration of 28 years from the date of first publication and a renewal right for a further term of 28 years. Copyright Act, ch. 391, § 24, 61 Stat. 659 (1947) (repealed 1976). Generally, under the new copyright act, the copyright of a work created after January 1, 1978 (effective date of the 1976 Act) has a duration of a term equal to the life of the author plus 50 years from the time of the author's death. 17 U.S.C. § 302(a)(1976). For the duration of copyrights on works created before January 1, 1978, and copyrights existing on that date, see *id.* §§ 303, 304. *See generally* N.Y. PRACTICING LAW INSTITUTE, PRACTICING UNDER THE COPYRIGHT LAW OF 1976 (1978); *Copyright Symposium, supra* note 7 (reviewing the new Act).

[13] 17 U.S.C. § 201(d)(2) (1976). The Act defines transfer of copyright ownership as "an assignment, mortgage, exclusive license, . . . of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a non-exclusive license." *Id.* § 101; *see* H. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY §§ 6-19, at 38-63 (1944) (nature of copyright).

[14] 17 U.S.C. § 201(d)(2) (1976).

[15] *Id.* § 101, 201; *see* note 13 *supra.*

[16] *See* First Fin. Marketing Servs. Group, Inc. v. Field Promotions, Inc., 286 F. Supp. 295, 298 (S.D.N.Y. 1968) (legal title to copyright may be conveyed only in its entirety); L. AMDUR, COPYRIGHT LAW AND PRACTICE 784-844 (1936) (assignment and licenses).

[17] A nonexclusive license is not a transfer of copyright ownership. 17 U.S.C. § 101 (1976). However, it will take priority over a subsequent transfer of ownership or a prior unrecorded transfer of ownership of which the nonexclusive licensee did not have notice, if the license is in writing and signed by the owner of the rights so licensed. *Id.* § 205(f). *But see* P. RUCK & E. JAMES, COPYRIGHT 249 (1956) (plaintiff in infringement suit must show infringement of that part of the copyright vested in him). *See also* B. RINGER & P. GITLIN, COPYRIGHTS 54-56 (1965) (discussing transfer and recordation).

considered the copyright owner of the particular exclusive rights granted by the license and no other person may exercise that right.[18] However, restrictions may be placed on the licensee's use of these rights.[19] Restrictions generally concern prices at which the licensee may sell or display the work[20] and limitations on the field or territory in which the copyrighted work may be used.[21] However, the monopoly created under the Copyright Act was not intended to authorize agreements that unlawfully restrain trade.[22]

II. The Sherman Antitrust Act

The Sherman Antitrust Act[23] was enacted by Congress in 1890. Sections 1 and 2 contain its broadly worded substantive provisions. Section 1 provides that every contract, combination, or conspiracy in restraint of trade is illegal.[24] Section 2 provides

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[18] 17 U.S.C. § 101 (1976). This is a definitional section which states that " '[c]opyright owner', with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right." *Id.; see* P. Ruck & E. James, *supra* note 17, at 181-84 (discussing limitations and conditions of transfer).

[19] *See* 17 U.S.C. § 191 (1976) (exclusive license, although limited in time or place of effect, is a transfer of copyright ownership).

[20] *See, e.g.*, Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 341 (1908) (retail price restrictions invalid where no privity exists between copyright owner and retail seller); Columbia Pictures Corp. v. Coomer, 99 F. Supp. 481, 482 (E.D. Ky. 1951) (upholding minimum admission fees imposed by copyright owner on theater owners).

[21] *See, e.g.*, United States v. Chicago Tribune-New York News Syndicate, Inc., 309 F. Supp. 1301, 1302 (S.D.N.Y. 1970) (territorial restrictions on the sale of newspaper features); Inge v. Twentieth Century-Fox Film, Corp., 143 F. Supp. 294, 296-97 (S.D.N.Y. 1956) (upholding restrictions on when copyrighted film could be released).

[22] Straus v. American Publishers Ass'n, 231 U.S. 222, 234-35 (1913); J. Taubman, Copyright and Antitrust 47-49 (1960).

[23] 15 U.S.C. §§ 1-7 (1976). When Congress enacted the Sherman Act, it exercised the full extent of its power under the commerce clause of the Constitution. Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 435 (1932). The Supreme Court has recognized that the Sherman Act is as important to the preservation of the free enterprise system as the Bill of Rights is to the preservation of fundamental liberties. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972). *See generally* H. Thorelli, The Federal Antitrust Policy 54-160 (1954) (historical and ideological reasons for passage of Sherman Act).

[24] Sherman Act § 1, 15 U.S.C. § 1 (1976) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal

that every person who monopolizes or attempts to monopolize, or combines or conspires to monopolize trade or commerce is guilty of a felony.[25]

In order for an activity to come within the purview of the Sherman Act, it must affect interstate commerce.[26] This requirement presents little difficulty, however, since the "affecting commerce" requirement has been so liberally interpreted.[27]

A. Classification of Conduct that Violates Section 1 of the Sherman Act

Certain types of conduct have been held to be so detrimental to free competition that they are considered per se violations of section 1 of the Sherman Act.[28] Other types of conduct may

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shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

See generally 1 E. KINTNER, FEDERAL ANTITRUST LAW §§ 4.1-4.18, at 125-242 (1980) (legislative history of the Sherman Act).

[25] Sherman Act § 2, 15 U.S.C. § 2 (1976) provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[26] *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 785 (1975) (Sherman Act applies once it is shown that the challenged activity affects commerce, and no specific magnitude of the effect must be proved); Houston, E. & W. Ry. v. United States, 234 U.S. 342, 351-52 (1914) ("affection" doctrine applied to Sherman Act violations).

[27] *See, e.g.*, Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 741-44 (1976) (local hospital's purchasing medicine and supplies out of state affects commerce); United States v. Employing Plasterers Ass'n, 347 U.S. 186, 189 (1954) (completely local restraints can produce the effects condemned by the Sherman Act); Lorain Journal Co. v. United States, 342 U.S. 143, 150-52 (1951) (local newspaper affects commerce by distributing news transmitted over national wire service); Wickard v. Filburn, 317 U.S. 111, 120-24 (1924) (wheat produced by farmer affects commerce and is subject to federal regulation). *See also* L. SULLIVAN, ANTITRUST §§ 232-33, at 708-14 (1977) (discussing Sherman Act coverage and coverage of other antitrust laws).

[28] Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). The Court stated that per se violations of the antitrust laws are those "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to

be found to be violations if, when examined under the rule of reason, they are found to be unreasonable restraints upon trade.[29]

1. Price Fixing

The horizontal fixing of prices by competitors is a per se violation of the Sherman Act.[30] It is immaterial that the prices fixed are reasonable prices or that the purpose of fixing the prices is to end competition destructive to the competitors or to eliminate price instability harmful to consumers and producers.[31]

Illegal price fixing includes both the setting of minimum prices[32] and agreements fixing maximum prices.[33] Price fixing also encompasses indirect methods of fixing prices such as agreements among buyers to limit purchases.[34]

Vertical price fixing agreements between manufacturers and distributors or retailers are also per se violations of section 1 if a conspiracy, combination, or agreement to fix such prices is

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the precise harm they have caused or the business excuse for their use." *Id.* at 5; *see* M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 89-135 (1973) (critique of Supreme Court's formulation of antitrust doctrines).

[29] Standard Oil Co. v. United States, 221 U.S. 1, 66 (1911) (rule of reason is the guide in construction of Sherman Act); United States v. American Tobacco Co., 221 U.S. 106, 178-84 (1911) (Sherman Act applies to acts which unduly restrain trade). *See generally* Bork, *The Rule of Reason and the Per se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 403 (1966) (economic analysis of vertical market division).

[30] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (conspiracy among oil producers to fix prices by purchasing excess oil); United States v. Trenton Potteries Co., 273 U.S. 392, 398 (1927) (price fixing illegal regardless of reasonableness of prices fixed).

[31] *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (prevention of adverse effects of competition not a defense).

[32] *See, e.g.*, Goldfarb v. Virginia State Bar, 421 U.S. 773, 775-79 (1975) (lawyers' title searches); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 166-70 (1940) (agreements designed to prevent surpluses from lowering prices).

[33] Albrecht v. Herald Co., 390 U.S. 145, 149-52 (1968) (conspiracy to fix maximum resale prices of newspapers per se violation); Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 213 (1951) (conspiracy to fix maximum resale prices between parent and subsidiary held illegal per se).

[34] *See* National Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421, 423-26 (1965) (agreement to limit purchases of wheat, thereby maintaining lower prices, held illegal); 2 E. KINTNER, *supra* note 24, §§ 10.2-10.18, at 62-128 (discussing aspects of price fixing).

found.[35] In *United States v. Colgate*[36] the Court held that a seller could refuse unilaterally to deal with a customer who did not adhere to suggested retail prices.[37] However, such a refusal must be purely unilateral, and since this is rarely the case, most refusals to deal for failure to maintain suggested prices are found to be violations of the Sherman Act.[38]

An exception to the prohibition against price fixing is found in the area of patent law. In *United States v. General Electric*,[39] the Court held that a patentee could restrict the prices at which his licensee could sell his patented product, reasoning that the ability to set conditions upon use was part of the reward of the patent.[40] However, the owners of two patents may not cross-license and then fix the prices to be charged for the resulting product.[41]

2. Division of Territories

Horizontal agreements among competitors to divide up a market for a particular product or service are per se violations of

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[35] *See* Albrecht v. Herald Co., 390 U.S. 145, 149-52 (1968) (resale price fixing per se violation if done by agreement or combination); United States v. Parke, Davis & Co., 362 U.S. 29, 45-47 (1960) (conspiracy between distributors and retailers to maintain resale prices violated Sherman Act).

[36] 250 U.S. 300 (1919).

[37] *Id.* at 307.

[38] In United States v. Parke, Davis & Co., 362 U.S. 29 (1960), the applicability of the *Colgate* doctrine was, in the thinking of most observers, greatly restricted: "When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices . . . he has put together a combination in violation of the Sherman Act." *Id.* at 44. *See generally* Dam & Pitofsky, *Debate: Is the Colgate Doctrine Dead?*, 37 A.B.A. ANTITRUST L.J. 772 (1968); Levi, *The Parke, Davis-Colgate Doctrine: The Ban On Resale Price Maintenance*, 1960 SUP. CT. REV. 258.

[39] 272 U.S. 476 (1926).

[40] *Id.* at 493-94. The *General Electric* case has been a subject of much criticism and debate. *See, e.g.*, Austern, *Fish Traps, Indians and Patents: The Antitrust Validity of Patent License Restrictions on Sales, Price, Field of Use, Quantity and Territory*, 28 U. PITT. L. REV. 181, 184-88 (1966) (examining the erosion of the patentee's right to fix the price at which his licensee sells).

[41] United States v. Line Material Co., 333 U.S. 287, 307 (1948). In that case the Court stated, "[i]n the absence of patent or other statutory authorization, a contract to fix or maintain prices in interstate commerce has long been recognized as illegal *per se* under the Sherman Act." *Id.* (footnotes omitted).

section 1.[42] As with price fixing, no defenses or justifications are allowed.[43] The rationale for this rule is that, by dividing territories, each competitor is given a monopoly in his own area with the resultant power to fix prices.[44]

Vertical divisions of territories are agreements whereby a manufacturer imposes restrictions upon the territories in which his dealers may sell or places limits upon the customers to whom the dealers may sell. In *United States v. Arnold, Schwinn & Co.*,[45] the Court held such restrictions to be per se violations of section 1.[46] The per se rule of *Schwinn* was overruled, however, by *Continental T.V., Inc. v. GTE Sylvania Inc.*,[47] where the Court held that vertical restrictions on territories and customers are to be tested under the rule of reason.[48]

3. Tying Arrangements

The Supreme Court has defined a tying arrangement as an agreement by one party to sell a product, the tying product, on the condition that the purchaser buy another distinct product, the tied product.[49] A tying arrangement is illegal under section 1 of the Sherman Act if the seller has sufficient market power in the tying product to foreclose a substantial volume of the market for the tied product.[50] The requisite market power may be the result of a legal monopoly, such as a patent or copyright held

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[42] *E.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972) (division of territories by association of grocers); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 595-98 (1951) (territorial division of world markets).

[43] United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

[44] *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 241 (1899) (agreement to divide territories enhances price and thus restrains trade). *See generally* Comment, *Horizontal Territorial Restraints and the Per Se Rule*, 28 WASH. & LEE L. REV. 457 (1971).

[45] 388 U.S. 365 (1967).

[46] *Id.* at 379.

[47] 433 U.S. 36 (1977).

[48] *Id.* at 57-58. *See generally* Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1 (1978).

[49] Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958) (lessees of land owned by railroad required to ship over railroad line).

[50] Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605-09 (1953) (purchasers of advertising space in morning newspaper required to buy same unit in evening newspaper).

by the seller over the tying product,[51] or the result of extensive land holdings in a particular area,[52] or, in certain cases, the result of the seller's ability to offer unique or advantageous terms which none of his competitors is able to offer.[53]

Tying arrangements have been justified when employed by a new business with an uncertain future to assure that proper equipment will be used in conjunction with its product and to allow for the testing of new products.[54] In other cases, tying arrangements have been held to be legal where an additional product is essential for the proper functioning of the tying product.[55]

Where the tying product is a patented product of the seller, it is generally held that conditioning its purchase on the purchase of another unpatented product is a violation of both section 1 of the Sherman Act and section 3 of the Clayton Act.[56] However, in *Electric Pipe Line v. Fluid Systems*,[57] where the

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[51] *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) (copyright); International Salt Co. v. United States, 332 U.S. 392, 395-96 (1947) (patent).

[52] *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 2-8 (1958) (railroad tied agreements to ship over its lines to sale or lease of valuable land).

[53] *See* United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 617-22 (1977) (offer of full financing unavailable from other sources not found to be a unique term).

[54] United States v. Jerrold Elec. Corp., 187 F. Supp. 545, 552-58 (E.D. Pa. 1960) (patentee's practice of selling equipment only in conjunction with service contract was reasonable since system failures would have greatly harmed the new industry), *aff'd per curiam*, 365 U.S. 567 (1961).

[55] In Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653, 656 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961), a manufacturer was permitted to use a tie-in arrangement largely because his customers had complained of breakdowns when using his product in conjunction with products manufactured by another source. 292 F.2d at 656.

For a more complete analysis of tie-ins, see Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis*, 30 LAW & CONTEMP. PROB. 552 (1965); Markovitz, *Tie-ins, Reciprocity, and the Leverage Theory*, 80 YALE L.J. 195 (1970); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958).

[56] *See* Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 667 (1944) (tying unpatented device runs afoul of antitrust law even if device is part of patented whole); Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 490-91 (1942) (patent gives no immunities from antitrust violations for products not within grant). The types of tying arrangements attacked under § 3 of the Clayton Act, 15 U.S.C. § 14 (1976), are more limited than those challenged under the Sherman Act; but, the procedure is not as difficult. 2 E. KINTNER, *supra* note 24, § 10.52 at 226. Tie-ins are prohibited under the Federal Trade Commission Act. 15 U.S.C. § 45(a) (1976).

[57] 231 F.2d 370 (2d Cir. 1956).

owner of a combination patent designed the installation and guaranteed its performance, the Court held it was not unlawful for him to require the buyer to purchase components from him.[58]

B. Monopolization and Attempts to Monopolize in Violation of Section 2

Section 2 of the Sherman Act prohibits monopolization, conspiracy or combination to monopolize, and attempts to monopolize.[59] There are two elements involved in a monopolization offense: (1) possession of monopoly power in the relevant market and (2) the intent to monopolize.[60] Monopoly power exists where one has sufficient power over any part of trade or commerce to control prices or to exclude a competitor.[61] If the alleged monopolist has the requisite power over price and competition, the intent to monopolize may be assumed.[62]

To determine a defendant's market share it is necessary to determine the relevant geographic market and the relevant product market. The relevant geographic market is the area in which the seller and his competitors sell.[63] The relevant product market includes those products which are of like price, quality, and grade so that they are reasonably interchangeable by

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[58] *Id.* at 371-72. The guarantee distinguished this case from Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944). 231 F.2d at 372. For a discussion of tie-ins involving patents and the corollary issues of patent misuse and contributory infringement, see generally Frost, *Tying Clauses and Package Licensing*, 28 U. PITT. L. REV. 207 (1966); Oppenheim, *Patents and Antitrust: Peaceful Coexistence?*, 54 MICH. L. REV. 199 (1955); Schueller, *The New Antitrust Illegality Per Se: Forestalling and Patent Misuse*, 50 COLUM. L. REV. 170 (1950); Note, *Contributory Infringement and Misuse*, 66 HARV. L. REV. 909 (1953).

[59] See note 25 *supra* for text of § 2 of the Sherman Act.

[60] United States v. Grinnel Corp., 384 U.S. 563, 570-71 (1966).

[61] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956); *see* P. AREEDA & D. TURNER, ANTITRUST LAW §§ 500-536, at 321-430 (1978) (discussion of techniques for defining market power).

[62] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 392 (1956); *see* United States v. Paramount Pictures, Inc., 334 U.S. 131, 173 (1948) (intent to monopolize was assumed).

[63] *See* United States v. Grinnel Corp., 384 U.S. 563, 575-76 (1966) (relevant geographic market for central station protective services was national).

consumers.[64]

The percentage of the market held by the defendant is considered a primary indication of monopoly power.[65] Other contributing factors which are significant in determining the presence of monopoly power include: strength of remaining competition, whether the company's actions were motivated by business requirements or a purpose to monopolize, likelihood of future development in the industry, customer demand, and barriers to entry into the market.[66]

In addition to actual monopolization, section 2 also makes conspiracies to monopolize and attempts to monopolize violations.[67] Establishing a conspiracy to monopolize requires proof of three elements: concerted action pursuant to an express or implied agreement, specific intent to acquire monopoly power,[68] and an effect on an appreciable part of interstate commerce.[69] To establish an attempt to monopolize in violation of section 2, overt acts in furtherance of a specific intent to establish monopoly power must be proved.[70] The plaintiff must also show that the defendant, in his attempt to monopolize, possessed sufficient market power to create a dangerous probability of monopolization.[71] Courts usually require analysis of relevant market shares

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[64] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 393 (1956) (relevant product market includes substitute goods and not merely the market for particular goods produced by alleged monopolizer).

[65] *See, e.g.*, United States v. Grinnel Corp., 384 U.S. 563, 571 (1966) (87% of relevant market constitutes monopoly power); International Boxing Club, Inc. v. United States, 358 U.S. 242, 247-49 (1959) (81% of relevant market); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 398-404 (1956) (75% of market for cellophane but 20% of relevant market for flexible wrapping materials; no monopoly power in relevant market); United States v. American Tobacco Co., 221 U.S. 106, 162 (1911) (86% of relevant market constituted monopoly power); Standard Oil Co. v. United States, 221 U.S. 1, 33, 72-74 (1911) (90% relevant market); United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945) (90% of relevant market is sufficient to constitute monopoly power; doubtful whether 64% is sufficient; 33% is not sufficient).

[66] United States v. Columbia Steel Co., 334 U.S. 495, 527-28 (1954).

[67] 15 U.S.C. § 2 (1976).

[68] American Tobacco Co. v. United States, 328 U.S. 781, 809-14 (1946).

[69] United States v. Yellow Cab Co., 332 U.S. 218, 233 (1947).

[70] Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 628 (1953).

[71] *See* American Tobacco Co. v. United States, 328 U.S. 781, 785 (1946) (approving jury instruction that included as element dangerous probability of monopolization); Swift & Co. v. United States, 196 U.S. 375, 396 (1905) (dangerous probability combined

to demonstrate the dangerous probability of monopolization.[72]

III. Convergence of the Copyright Law and the Sherman Act

The Copyright Act grants to the copyright owner a statutory monopoly that is limited to the exclusive rights designated in the Act.[73] While the reward of exclusive rights is necessary to provide an incentive for authors, artists, and publishers, this reward is a secondary consideration[74] to the underlying purpose of the grant of copyright monopoly, which is to stimulate intellectual and artistic creation.[75] Another important consideration is the benefit to the public that flows from the dissemination of the copyrighted work.[76] Thus, the copyright law and the Sherman Act have the common purpose of benefitting the public. However, the former sanctions a monopoly and the latter forbids it. In order to resolve the conflicts between these laws, the competing interests of both must be weighed, with the balance tipping in favor of that interest which provides the greater public benefit at a lower cost to the public. Secondary consideration should be given to the possible benefit to the copyright owner or his competitors.[77] This section addresses the courts' approach to

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with intent is sufficient to proscribe attempt to monopolize); FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1030 (2d Cir. 1976) (to establish attempt to monopolize, dangerous probability of success must be shown), *cert. denied*, 429 U.S. 1097 (1977). *But see* Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 (9th Cir.) (if plaintiff shows specific intent and overt action, he need not show probability of monopoly), *cert. denied*, 377 U.S. 993 (1964).

[72] *See, e.g.*, Walker Process Equip., Inc. v. Food Mach. & Chem. Co., 382 U.S. 172, 177 (1965) (dictum) (attempt to monopolize requires appraisal of patent's exclusionary power in terms of relevant product market); Yoder Bros. v. California-Fla. Plant Corp., 537 F.2d 1347, 1368 (5th Cir. 1976) (with 20% market share, there was no dangerous probability of success in the attempt to monopolize), *cert. denied*, 429 U.S. 1094 (1977).

See generally L. Sullivan, *supra* note 27, §§ 5-58, at 19-151 (1977); Bowman, *Toward Less Monopoly*, 101 U. Pa. L. Rev. 577 (1953); Note, *Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Prerequisite to a Prima Facie Case*, 73 Colum. L. Rev. 1451 (1973).

[73] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 154-55 (1975); *see* notes 8 through 19 and accompanying text *supra*.

[74] Mozer v. Stein, 347 U.S. 201, 219 (1954).

[75] Goldstein v. California, 412 U.S. 546, 555 (1973).

[76] United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948).

[77] *Id.*

resolving the dilemma arising out of the convergence of the copyright law and the Sherman Act.

A. *The Copyright Law and Section 1 of the Sherman Act*

1. Retail Price Maintenance of Copyrighted Articles

The United States Supreme Court first considered the copyright-antitrust problem in *Bobbs-Merrill Co. v. Straus.*[78] In that case, a copyrighted book was published with a notice in the book that no licensee was authorized to sell the book for less than one dollar, and that sale at a lower price would be treated as copyright infringement.[79] Contending that there was authority under the copyright statute to control retail prices, the publisher maintained that the retail book seller had infringed the copyright license.[80] The Court disagreed and recognized that while the copyright owner had the exclusive right to sell the book, there was no right to impose, by notice, a minimum price at which the book could be resold.[81] After sale of a copyrighted article, restrictions on use are beyond the scope of the copyright monopoly.[82] However, the Court did not decide whether the publisher's license agreements violated the Sherman Act.[83]

Publishers' agreements with book sellers to maintain retail prices were found to be in violation of the Sherman Act in *Straus v. American Publishers Association.*[84] The Court, finding that agreements between an association of publishers and a booksellers' association almost completely destroyed price competition among book sellers in the United States, held that the agreements were not justified by the Copyright Act and that they violated section 1 of the Sherman Act.[85] These decisions established two basic propositions: (1) the copyright law does not permit copyright owners, after sale of the copyrighted arti-

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[78] 210 U.S. 339 (1908).

[79] *Id.* at 341.

[80] *Id.* at 343.

[81] *Id.* at 350; *cf.* Bauer & Cie v. O'Donnel, 229 U.S. 1, 17 (1912) (patentee does not have right to limit the price at which a patented article may be resold at retail).

[82] 210 U.S. at 351.

[83] *Id.*

[84] 231 U.S. 222 (1913).

[85] *Id.* at 235-36.

cle, to restrict the price at which the article may subsequently be resold; and (2) agreements by copyright owners conspiring to maintain prices on copyrighted articles are not justified by the Copyright Act and constitute a violation of section 1 of the Sherman Act.[86]

Maintenance of retail prices on copyrighted articles is comparable to an attempt by the owner of a copyrighted motion picture to grant an exhibition license that establishes a minimum admission price that an exhibitor must charge his theatre patrons. In *Interstate Circuit, Inc. v. United States*,[87] the Supreme Court considered the permissibility of this practice. In that case, the government brought suit against eight separate motion picture distributors and two affiliated exhibitors.[88] Each of the distributors agreed with both exhibitors that, in licensing other exhibitors, minimum admission prices would be maintained and exhibition of double features would be prohibited.[89] Although there was no express agreement among the distributors nor simultaneous action on their part, the Court found that the evidence was sufficient to establish an unlawful conspiracy under the Sherman Act.[90] Recognizing that the owners of a copyrighted motion picture have the exclusive right to exhibit the film and to grant restrictive and exclusive licenses for exhibition,[91] the Court rejected the distributors' contention that their copyrights were sufficient to remove the price maintenance agreements from the operation of the Sherman Act.[92] The distributors argued that since the owner of a patent, in a license to manufacture and sell the patented article, may lawfully fix the price at which the licensee can sell the article, then the owner of a copyright should likewise be able to restrict admission prices.[93]

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[86] *See generally* H. TOULMIN, ANTITRUST LAWS §§ 28.1-28.21, at 820-23 (1950) (discussing combinations of book sellers and publishers to control prices).

[87] 306 U.S. 208 (1939).

[88] *Id.* at 214. The distributor defendants were distributors of 75% of all first class feature films exhibited in the United States. *Id.* Interstate Circuit was an affiliated exhibitor which operated 43 theatres in six Texas cities. *Id.* at 215.

[89] *Id.* at 217-18.

[90] *Id.* at 226-27.

[91] *Id.* at 227.

[92] *Id.* at 228.

[93] *Id.* The distributors relied upon United States v. General Elec. Co., 272 U.S. 476

The Court did not address this contention directly, but stated that even if each distributor were free to impose the price restrictions on his licensee, the distributors were not permitted to use their copyrights collectively to restrain commerce in order to protect the exhibitor's monopoly by suppressing competition.[94] Thus, it is clear that copyright owners may not combine, conspire, or agree to impose restrictions on minimum prices that their licensees may charge. However, it is not clear whether a copyright holder may unilaterally impose such restrictions on his licensee in the absence of collective activity with other copyright holders. The Court also found that the contracts between each distributor and the exhibitor, which contained provisions for imposition of the minimum admission prices on the exhibitor's competitors, violated the Sherman Act.[95] Therefore, the copyright owner cannot lawfully agree with a third party to impose a minimum admission price on a subsequent licensee. Although the Court in *Interstate Circuit* left unanswered the question of the right of a licensor of a copyrighted film to impose price restrictions on his licensee,[96] the issue was characterized as "wholly academic" in a subsequent case.[97]

2. Price Fixing and Copyrights

In *United States v. Paramount Pictures, Inc.*,[98] the trial court established that there was a horizontal price fixing conspiracy among the major motion picture distributors and a vertical price fixing conspiracy between each of the distributors and

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(1926), which held that the owner of a patented article could fix the price at which his agents transferred title to the purchaser. 306 U.S. at 488; *see* note 40 and accompanying text *supra*.

[94] 306 U.S. at 228-32.

[95] *Id.* at 228.

[96] *Id.* at 227-28.

[97] United States v. Paramount Pictures, Inc., 334 U.S. 131, 144 (1948). In Columbia Pictures Corp. v. Coomer, 99 F. Supp. 481 (E.D. Ky. 1951), a federal court did address this "wholly academic" issue. In affirming the right of a copyright owner to impose minimum admission prices for a copyrighted film, the court reasoned that such a practice was reasonable and normally adopted to secure the copyright owner's reward under the copyright monopoly. *Id.* at 482 (citing United States v. General Elec. Co., 272 U.S. 476, 489-90 (1926)).

[98] 334 U.S. 131 (1948).

their licensees.[99] Finding the evidence sufficient to establish the vertical price fixing conspiracy, the Supreme Court rejected the contention that copyrights on the motion pictures provided immunity from a Sherman Act violation.[100] Stating that express agreements were not necessary to establish a horizontal price fixing scheme, the Court also found a horizontal price fixing violation of the Act.[101] The Court applied the per se rule against price fixing to the horizontal conspiracy,[102] rejecting arguments that the rule should not apply when the fixed prices pertain to copyrighted articles.[103]

In the federal district court case of *Alden-Rochelle, Inc. v. ASCAP*,[104] the American Society of Composers, Authors, and

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[99] *Id.* at 142.

[100] *Id.* at 142-44.

[101] *Id.* at 142-43.

[102] *Id.* at 143; *see* notes 28 through 35 and accompanying text *supra* (discussion of per se rule).

[103] 334 U.S. at 143-44. In support of the application of the per se rule, the Court drew an analogy to previous holdings involving price fixing and patents. *Id.* (citing United States v. United States Gypsum Co., 333 U.S. 364, 400-01 (1948), for the proposition that patent owners could not control an entire industry through licenses that contained price fixing agreements). The Court found that the defendants had similarly controlled admission prices for the exhibition of motion pictures throughout the entire movie industry. 334 U.S. at 143. Reasoning that since the rights of a copyright owner are not greater than those of patent owners, the Court concluded that the horizontal conspiracy was illegal. *Id.* at 143-44. *Paramount* also involved clearance provisions. In a copyright license between a distributor and an exhibitor, a clearance provision provides that the licensed film will not be licensed to another exhibitor for a designated period of time. The Court determined that clearances which are reasonable for the exhibitors' protection are not unlawful. *Id.* at 145-48. However, the evidence was deemed sufficient to support the trial court's finding of a conspiracy to restrain trade through imposition of unreasonable clearances. *Id.* at 146.

[104] 80 F. Supp. 888 (S.D.N.Y. 1948). ASCAP is an unincorporated association of authors, composers, and publishers that was formed in 1914 for the purpose of licensing the nondramatic performance rights of copyrighted musical compositions. *Id.* at 891. The primary purpose for the formation of ASCAP was to detect infringement of its members' copyrights because, on an individual basis, it would have been difficult and almost impossible for the copyright owner to discover arbitrary infringements of the performing right. *Id.* In order to enforce their copyrights, the ASCAP members assigned their performing rights to the association, and ASCAP would have its representatives patronize establishments that performed music. *Id.* When infringements were discovered, ASCAP would ask the establishment to take a blanket license that covered all compositions of the ASCAP members and upon refusal by the infringer, ASCAP would file an infringement suit. *Id.* The funds collected from the issuance of the blanket licenses, after deduction of expenses, would then be distributed among the ASCAP members. *Id.*

Publishers (ASCAP) and its members were charged with a price fixing conspiracy. The operators of several motion picture theatres brought suit challenging the procedure for licensing the performing rights to copyrighted music in motion picture soundtracks.[105] Blanket licenses covering all compositions in ASCAP's repertory were issued to the exhibitors and "very reasonable" annual license fees, based on the theatre's seating capacity, were charged.[106] The exhibitors contended that ASCAP constituted an illegal monopoly and that its price fixing power was an unlawful restraint of trade.[107] The court agreed,[108] and stated that neither the fact that ASCAP had been reasonable in the prices fixed, nor the fact that it served a legitimate purpose in enabling ASCAP members to detect copyright infringement would preclude a finding of a per se violation of the Sherman Act.[109]

For the historical, organizational, and structural aspects of ASCAP, see Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 LAW & CONTEMP. PROB. 294, 295-96 (1954) (structure and function); White, *Musical Copyrights v. The Anti-Trust Laws*, 30 NEB. L. REV. 50, 50-55 (1950) (history and organization); Comment, *ASCAP and the Antitrust Laws: The Story of a Reasonable Compromise*, 1959 DUKE L.J. 258, 259-62 (same); Comment, *Music Copyright Associations and the Antitrust Laws*, 25 IND. L.J. 168, 168-71 (1949) (history and structure).

[105] 80 F. Supp. at 890-92. This procedure involved the granting of three nonexclusive licenses. First, the owner of the musical copyright, a member of ASCAP, would assign his performing right to ASCAP. The ASCAP member would also license the film producer to record and synchronize the composition with the film's soundtrack. The performing rights to this synchronized version would, however, be excepted from this license agreement. Finally, after the motion picture exhibitor obtained a license to exhibit the film, ASCAP would grant to him a license to perform the synchronized version contained in the soundtrack. *Id.* at 892.

[106] *Id.* at 892.

[107] *Id.* at 895. The court found that ASCAP was an illegal monopoly in violation of § 2 of the Sherman Act.

[108] *Id.* at 895.

[109] The court did not expressly state that the per se rule was being applied. However, the court quoted from United States v. Trenton Potteries Co., 273 U.S. 392 (1927), which is often cited as the origin of the rule. The *Alden-Rochelle* court stated: "Agreements which create such potential power [to fix prices] may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed . . . ." 80 F. Supp. at 895 (quoting *Trenton Potteries*, 273 U.S. at 397-98).

At the time *Alden-Rochelle* was decided, ASCAP was operating under a consent decree entered into with the federal government. United States v. ASCAP, [1940-43] Trade Cas. ¶ 56,104 (S.D.N.Y. 1950). This decree was amended in 1950 and the provisions of the *Alden-Rochelle* decree were incorporated into the amended consent decree. United

Nine years later, in *Columbia Broadcasting Systems, Inc. v. ASCAP*,[110] the Court of Appeals for the Second Circuit applied the per se rule against ASCAP and held that its issuance of blanket licenses amounted to price fixing in violation of section 1 of the Sherman Act.[111] The court stated that Columbia Broadcasting Systems, Inc. (CBS) was not a party to the consent decree, and the decree did not "disinfect" ASCAP from a Sherman Act violation.[112] The court stated that there was a market necessity exception to the per se rule,[113] but found it inapplicable to

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States v. ASCAP, [1950-51] Trade Cas. ¶ 62,595 (S.D.N.Y. 1950). *See generally* Timberg, *supra* note 104.

A provision of this consent decree was used in K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968), to persuade the Court of Appeals for the Ninth Circuit that ASCAP was not guilty of price fixing. 372 F.2d at 4. The provision relied upon allowed each ASCAP license applicant who believed the fee proposed by ASCAP was unreasonable to apply to the District Court for the Southern District of New York to fix a reasonable fee. ASCAP, upon such application, had the burden to prove that the proposed fee was reasonable. The *K-91* court upheld the lower court's finding that ASCAP did not violate the antitrust laws against price fixing so long as they complied with the consent decree, since they had no final price fixing authority. Thus, the court did not reject the per se rule as applied to price fixing schemes by copyright holders, but rather found that because of the consent decree price fixing did not exist in this case. *Id.*

[110] 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom.* Broadcast Music, Inc. v. Columbia Broadcast Syss., Inc., 440 U.S. 1 (1979).

[111] 562 F.2d at 140.

[112] *Id.* at 139.

[113] *Id.* at 136-38. *CBS* was widely noted for its recognition of the market necessity exception. *See, e.g.*, Cirace, *CBS v. ASCAP: An Economic Analysis of a Political Problem*, 47 FORDHAM L. REV. 277, 280-89, 295-98 (1978) (economic analysis of the blanket license and monopoly power of networks); Note, *The Middle-Man as Price Fixer*, 91 HARV. L. REV. 488, 490-93 (1977) (concluding bulk licensing is most efficient alternative); Comment, *Antitrust Law—Price Fixing—Issuance of a Blanket License to a Television Network for Nondramatic Performing Rights Constitutes Price Fixing*, 6 HOFSTRA L. REV. 445, 451-60 (1978) (comparing per se rule with market functioning exception to rule of reason and concluding decision under rule of reason would have been better); Note, *CBS v. ASCAP: Performing Rights Societies and the Per Se Rule*, 87 YALE L.J. 783, 784-800 (1978) (concluding market necessity exception defeats purpose of per se rule and legislative exception is the solution).

The Second Circuit thought that the Ninth Circuit's rejection of the antitrust defense in *K-91* was based upon the market necessity exception. 562 F.2d at 137. However, it is clear from the *K-91* opinion that the basis of the court's decision was not the market necessity but the realization that ASCAP could not fix prices as long as it complied with the consent decree. K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968).

the instant case.[114] On appeal,[115] the Supreme Court reversed, holding that the issuance of blanket licenses by ASCAP and Broadcast Music, Inc. (BMI) was not subject to the per se rule.[116] The Court characterized the blanket licenses issued by ASCAP and BMI as developments of the marketplace to prevent unauthorized use of copyrights and to provide users with unplanned and indemnified access to a large array of compositions.[117] Recognizing that the development of mass media had created the necessity for the blanket license and that restraints placed on ASCAP and BMI by the consent decrees could not be ignored, the Court remanded the case for a determination of the legality of the blanket license under the rule of reason.[118] On remand, the court of appeals determined that CBS had failed to show that the blanket licensing complained of restrained competition, and therefore under the rule of reason there was no violation of section 1 of the Sherman Act.[119]

3. Agreements Restricting the Territory Where a Copyrighted Article May be Used

Defining transfer of copyright ownership, the Copyright Act states that an exclusive license may be limited in time or place of effect.[120] The implication of the definition is that vertical territorial restrictions are sanctioned by the Act. However, the federal courts have not construed the definition in this manner. Neither are there any decisions dealing directly with horizontal

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[114] 562 F.2d at 140.

[115] Broadcast Music, Inc. v. Columbia Broadcasting Syss., Inc., 441 U.S. 1 (1979).

[116] *Id.* at 24. BMI is a performing rights society which functions as a nonprofit corporation owned by firms in the broadcast industry. It operates in a manner similar to ASCAP. Both BMI and ASCAP employ blanket licenses. Together their repertoires contain almost all of the popular domestic copyrighted musical compositions. At the time of the decision, ASCAP was stated to have over three million compositions in its repertoire and BMI to have over one million. *Id.* at 5; *see* Garner, *United States v. ASCAP: The Licensing Provisions of the Amended Final Judgment of 1950*, 23 BULL. COPYRIGHT SOC'Y 119, 121-23 (1975) (events leading to formation of BMI).

[117] 441 U.S. at 20.

[118] *Id.* at 21-25. *See generally* Hartnick, *From Black to White*, 27 BULL. COPYRIGHT SOC'Y 1 (1979) (discussing the implication of Court's decision in *CBS*).

[119] CBS v. ASCAP, 620 F.2d 930, 937-39 (2d Cir. 1980).

[120] 17 U.S.C. § 101 (1976); *see* notes 8 through 19 and accompanying text *supra*.

agreements restricting the territory in which a copyrighted object may be performed, displayed, sold, exhibited, or used. In the absence of judicial precedent, it seems highly probable that the normal rules that apply to territorial restrictions should apply when copyrights are involved.[121]

4. Copyrights and Illegal Tying Arrangements

Tying arrangements that involve copyrights are unlawful under the federal antitrust laws, and when a tie-in involves patents or copyrights the courts presume that there is an unlawful extension of the statutory monopoly.[122]

In the copyright field, the practice of block-booking of feature length films constitutes a tying arrangement violative of section 1 of the Sherman Act. Block-booking is the licensing of one or a group of feature films on the condition that the film exhibitor accept a license for another film or group of films.[123] There are two Supreme Court decisions dealing with tying arrangements that involve copyrights, both of which concern block-booking.

In *United States v. Paramount Pictures, Inc.*,[124] the Court held that it was a violation of the antitrust laws to refuse to license one or a number of copyrights on the condition that an additional copyright be accepted.[125] The Court reasoned that this practice restrained trade by equalizing the reward for various copyrights, regardless of their merit on the competitive market, and by giving some films a larger market than they would have otherwise, thus decreasing the demand for other, more deserving, films.[126] In *United States v. Loew's, Inc.*,[127] the Court

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[121] *See* United States v. Chicago Tribune-New York News Syn., Inc., 309 F. Supp. 1301, 1302 (S.D.N.Y. 1970) (territorial restrictions in exclusive license); notes 42 through 44 and accompanying text *supra*.

[122] L. SULLIVAN, *supra* note 27, § 86, at 244.

[123] United States v. Paramount Pictures, Inc., 334 U.S. 131, 156 (1948); *see* Stigler, *United States v. Loew's, Inc.: A Note on Block-Booking*, 1963 SUP. CT. REV. 152, 152-54 (economic analysis of block-booking).

[124] 334 U.S. 131 (1948).

[125] *Id.* at 159. In *Paramount*, copyrighted motion pictures which were unwanted were licensed as a condition for granting licenses to films which the exhibitors demanded.

[126] *Id.* at 158.

[127] 371 U.S. 38 (1962). The tie-in arrangements in *Loew's* involved the requirement

reaffirmed its position with respect to block-booking. Although the Court recognized the possibility that there might be a rare circumstance in which a tying arrangement involving a patented or copyrighted product would not be illegal, *Loew's* was not such a case.[128] In granting a remedy, the Court required distributors to quote individual prices on each film to television stations; however, package licensing was not prohibited if the films were offered individually and if the sum of individual prices was comparable to the package price.[129]

B. Section 2 of the Sherman Act: Monopolization Through Copyrights and Copyright Pooling

Although the Copyright Act grants a statutory monopoly to the copyright owner, the Act does not grant to copyright owners the right to combine in violation of the federal antitrust laws.[130] Such a combination is a monopoly and a violation of section 2 of the Sherman Act.[131] Furthermore, the illegality of an agreement which restrains competition and perpetuates a monopoly is not affected by the fact that the competitive article is copyrighted.[132] However, the Supreme Court has stated that the mere accumulation of a number of patents or copyrights into a pool does not

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of motion picture distributors that television stations accept unwanted films as a condition for licensing popular films. *Id.* at 48-50.

[128] *Id.* at 48-50.

[129] *Id.* at 50-54. The Court also prohibited price differences between the individual and package licenses unless the difference could be justified by a cost savings to the distributor. *Id.* at 54-55; *see* L. SULLIVAN, *supra* note 27, § 159, at 461 (package license which does not meet cost justification is unlawful tying arrangement); Stigler, *supra* note 123, at 152-54 (economic analysis of block-booking concluding effect of decision is to increase revenues of another set of monopolists, the television station owners); *cf.* Mulvey v. Goldwyn Prods., 433 F.2d 1073, 1075-76 (9th Cir. 1970) (plaintiff who sold film to distributor which licensed it by block-booking had standing to bring treble damage action against distributor).

[130] Watson v. Buck, 313 U.S. 387, 404 (1941).

[131] Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888, 893 (S.D.N.Y. 1948); *see* note 25 and accompanying text *supra*.

[132] Interstate Circuit, Inc. v. United States, 306 U.S. 208, 230 (1939). The possession of monopoly power in the relevant market and the intent to monopolize are the two elements necessary to establish monopolization in violation of § 2. *See* notes 71 through 72 and accompanying text *supra*.

in itself constitute unlawful monopolization.[133]

In *CBS v. ASCAP*, the district court held that because ASCAP and BMI were limited by consent decrees in their power to control prices, and since they had no power to exclude competitors because of CBS' access to other sources, they had no monopoly power[134] and were not guilty of a section 2 violation.[135] On appeal, the Court of Appeals for the Second Circuit agreed with the district court on the monopolization issue;[136] this issue was not, however, considered by the Supreme Court.[137]

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[133] Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827, 834 (1950). That case held that it was not misuse of the patent monopoly to license a user to use a large number of patents and to charge royalties based on the user's sales in a certain line of goods regradless of whether the patents were used to manufacture those goods. *Id.* at 834. *But see* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 135 (1969) (patentee cannot require royalty based on sale of goods that are not manufactured under licensed patents).

Although the accumulation of copyrights does not itself constitute monopolization, the court in *Alden-Rochelle*, 80 F. Supp. 888 (S.D.N.Y. 1948), stated that where copyright owners combine their copyrights, a monopoly is created that extends beyond the granted legal monopoly, and thus there is a violation of § 2. *Id.* at 893-94.

The same district court that decided *Alden-Rochelle* was later presented with an almost identical question in Affiliated Music Enterprises v. Society of European Stage Actors (SESAC), 160 F. Supp. 865 (S.D.N.Y. 1958), *aff'd*, 268 F.2d 13 (2d Cir.), *cert. denied*, 351 U.S. 831 (1959). SESAC, engaged in collecting assignments of copyrighted musical performance rights and issuing blanket rights to users, was found to control only 20% to 30% of the relevant market in performance rights to gospel music. The court found that there was no monopoly power to control prices or to exclude competitors, and therefore no violation of § 2 of the Sherman Act. 160 F. Supp. at 867-75.

[134] CBS v. ASCAP, 400 F. Supp. 737, 783 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom.* BMI v. CBS, 440 U.S. 1 (1979).

[135] 400 F. Supp. at 782-83. The court also determined that there was no substantial evidence that ASCAP and BMI had attempted to monopolize the market for performance rights with respect to the networks and that the networks had obtained the blanket licenses on their own volition. *Id.* at 783.

[136] 562 F.2d at 135, 141 n.29.

[137] 440 U.S. at 6-7. *Alden-Rochelle* can be distinguished from *CBS v. ASCAP* because in the former case the court found that the defendant had the power to control prices and exclude competitors, whereas in the latter the court found that the defendants did not have this power. Thus, it could be concluded from these cases that the pooling of copyrights and the issuance of blanket licenses is only a violation of § 2 when the power to control prices and exclude competitors is created as a result of the combination.

C. *Sherman Act Violation as a Defense to Copyright Infringement*

Violation of the exclusive rights of the copyright owner gives rise to an action for infringement of the copyright[138] for which injunctive relief[139] and damages[140] may be awarded. When the copyright owner seeks damages only, the infringement action is brought at law.[141] However, if equitable remedies are sought, the infringement action is equitable in nature.[142] Thus equitable defenses such as unclean hands[143] and misuse of copyright[144] are common defenses to copyright infringement actions.[145] The fact that the copyright owner has violated the antitrust laws has also been asserted as an equitable defense in infringement actions.[146]

In *M. Witmark & Sons v. Jensen*,[147] a member of ASCAP brought an action for damages for copyright infringement and asked that future violations be enjoined.[148] The district court determined that ASCAP had violated sections 1 and 2 of the Sherman Act, and as a result the ASCAP member had extended his

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[138] 17 U.S.C. § 501(a) (1976).

[139] *Id.* § 502(a).

[140] *Id.* § 504(a). Actual damages to the copyright owner and the infringer's profits may be recovered. *Id.* § 504(b). Alternatively, the copyright owner may recover statutory damages. *Id.* § 504(c). The minimum statutory damage amount is $250 per infringement; the maximum amount is $10,000. *Id.* The actual amount of statutory damages recovered is in the court's discretion. *Id.*

[141] Tempo Music, Inc. v. Myers, 407 F.2d 503, 507 n.8 (4th Cir. 1969).

[142] *Id.* If the copyright owner has an adequate remedy at law, equitable relief will be denied. American Metro. Ent. of N.Y., Inc. v. Warner Bros. Records, Inc., 389 F.2d 903, 905 (2d Cir. 1968); *see* Shapiro, Bernstein & Co. v. 4636 S. Vermont Ave., Inc., 367 F.2d 236, 242 (9th Cir. 1966) (injunction denied where no probability of additional infringements).

[143] *See, e.g.*, Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 863 (5th Cir. 1979) (obscenity does not constitute unclean hands defense); Tempo Music, Inc. v. Myers, 407 F.2d 503, 506-07 (4th Cir. 1969) (ASCAP's failure to provide nightclub proprietor with list of compositions in repertory constituted unclean hands).

[144] *See, e.g.*, Greenbie v. Noble, 151 F. Supp. 45, 62 (S.D.N.Y. 1957) (copyright owner's refusal to publish biography was not a misuse).

[145] However, the Supreme Court had held that equitable doctrines should not be applied to defeat the purpose of a statute. Perma-Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138 (1968).

[146] H. TOULMIN, *supra* note 86, § 28.5, at 812-14.

[147] 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed sub nom.* M. Witmark & Sons v. Berger Amusement Co., 177 F.2d 515 (8th Cir. 1949).

[148] 80 F. Supp. at 844.

copyright monopoly beyond its proper scope.[149] Accordingly, the court denied relief for the infringement on the ground that equity should deny relief to one who has misused the copyright.[150] The court did not determine that a Sherman Act violation, standing alone, constituted a defense to an infringement action; but, because the Sherman Act violation constituted an unlawful extension of the copyright monopoly and a misuse of the copyright, the violation of the Act became an indirect defense.[151] One source of confusion in the areas of copyright and patent misuse is that the term "misuse" has been employed in two different situations: misuse involving an unlawful extension of the copyright or patent monopoly, and misuse involving conduct that violates the antitrust laws.[152] In *Alfred Bell & Co. v. Catalda Fine Arts*,[153] copyright owners brought an infringement suit which was defended on grounds that the owners had conspired in violation of the Sherman Act. The court found that there was a clear case of infringement and a marginal violation of antitrust law and, balancing the competing policies of prevention of piracy of copyrighted matter and enforcement of the antitrust laws,[154] ruled that the antitrust defense could not defeat the infringement action.[155]

In a more recent case, *Ortho-Vision, Inc. v. Home Box Office*,[156] the court held the general rule to be that a copyright holder's violation of the antitrust laws does not constitute a defense to a copyright infringement action.[157] The court noted that

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[149] *Id.* at 850.

[150] *Id.* There were several cases prior to *Witmark* which held that Sherman Act remedies were exclusive and did not constitute a defense to infringement actions brought by ASCAP. *E.g.*, Buck v. Cecere, 45 F. Supp. 441, 442 (W.D.N.Y. 1942) (allegation of plaintiff's use of copyright to monopolize); Buck v. Spanish Gables, Inc., 26 F. Supp. 36, 37 (D. Mass. 1938) (illegal restraint of trade not a defense); Buck v. Newsreel, Inc., 25 F. Supp. 787, 789 (D. Mass. 1938) (same).

[151] 80 F. Supp. at 850.

[152] Gibbs, *Copyright Misuse: Thirty Years Waiting for the Other Shoe*, 23 ASCAP COPYRIGHT L. SYMP. 31, 39-40 (1977).

[153] 191 F.2d 99 (2d Cir. 1951).

[154] *Id.* at 106.

[155] *Id.*; *see* Inge v. Twentieth Century-Fox Film Corp., 143 F. Supp. 294, 298-99 (S.D.N.Y. 1956) (citing *Alfred Bell*).

[156] 474 F. Supp. 672 (S.D.N.Y. 1979).

[157] *Id.* at 686.

antitrust violations had been held to be defenses to patent infringement actions and reasoned that the rationale in those cases might be extended to copyrights, although the Supreme Court has not ruled on the issue.[158] In *Ortho-Vision* the court found that no logical relationship existed between the anticompetitive activity of the plaintiff and its position as a copyright holder, and therefore, the court concluded that the antitrust defense should not be allowed.[159]

IV. Conclusion

The major difficulty created by the interaction of copyright and antitrust law is reconciling the need for practical marketing devices for copyrights with long-established prohibitions against certain types of business practices. This problem has arisen primarily with respect to performing rights societies which issue blanket licenses to users.[160]

The purpose of the copyright law is to provide the public with the benefits of artistic and creative endeavors.[161] If an author or composer is unable to market his product successfully, the public is deprived of the benefit of his work. In the modern entertainment industry, the existence of thousands of copyright holders and users, the need of users to have quick access to a large number of copyrighted works, and the inability of individual copyright holders to market their works efficiently and guard against infringement makes licensing on a one-to-one basis impractical.[162] Thus, the use of performing rights societies as selling agencies for copyright holders is necessary in order for the public to obtain the benefit of the author's work and is beneficial to copyright holders and users alike.

Difficulties arise when the activities of the society, which are necessitated by the peculiar needs of the enterprise, constitute

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[158] *Id.*

[159] *Id.* Although the status of the law in this area is somewhat unclear, the rule appears to be that antitrust violations may be asserted as defenses to copyright infringement actions only when the suit is for equitable relief and there is a nexus between the antitrust violation and the plaintiff's status as a copyright holder.

[160] *See* notes 104 through 119 and accompanying text *supra.*

[161] *See* notes 73 through 76 and accompanying text *supra.*

[162] BMI v. CBS, 441 U.S. 1, 20-25 (1979).

what otherwise would be a per se violation of the Sherman Act. Being presented with this dilemma, the courts have three options. First, they may find the practice to be a per se violation of the Sherman Act and thus destroy an effective and beneficial business practice.[163] Second, they may create an exception to the per se rule.[164] However, since this would require in each instance an inquiry into the nature of the activity to determine if it falls within the exception, the function of per se rules in eliminating the need for a case-by-case analysis would be destroyed.[165] Third, the courts may find that the challenged activity is not of such a detrimental nature that it should be classified as a per se violation and examine the activity under the rule of reason.[166]

Several commentators have suggested that the solution to this problem is legislation providing an exception to the antitrust laws for performing rights societies,[167] similar to that which exists for agricultural cooperatives and labor unions,[168] and creating a federal agency to regulate their activities.[169] These suggestions are both unwise and unnecessary.

The basic premise underlying the antitrust laws is that competition is highly beneficial to the economic well-being of our society.[170] In view of this premise, exceptions to the antitrust laws should be allowed only where there is substantial justification for the exception and where an alternative protective device is created to prevent undue restraints of competition which would be detrimental to the economy.[171]

The establishment of a federal agency to regulate the per-

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[163] *See* note 109 and accompanying text *supra*.

[164] *See* note 113 and accompanying text *supra*.

[165] *See* YALE L.J. Note, *supra* note 113, at 784-800 (market function exception would swallow per se rule).

[166] *See* BMI v. CBS, 441 U.S. 1, 8-25 (1979) (remanding the issue of blanket licensing for consideration under the rule of reason).

[167] *See* YALE L.J. Note, *supra* note 113, at 802.

[168] 15 U.S.C. § 17 (1976).

[169] *See* YALE L.J. Note, *supra* note 113, at 802. One commentator suggested that the industry is a national monopoly and should therefore be regulated as a utility is regulated. *See* HARV. L. REV. Note, *supra* note 113, at 497 n.44.

[170] *See* note 23 *supra*.

[171] *See* BMI v. CBS, 441 U.S. at 34-38 (Stevens, J., dissenting) (antitrust policy demands close scrutiny, especially where the statutory copyright and patent monopolies are involved).

forming rights societies would create a protective device to ensure fair competition. However, if the courts are capable of performing this function, it would be a waste of national resources to transfer this responsibility from the judicial to the administrative forum. Since the dilemma facing the courts with respect to performing rights societies can be resolved by applying a proper conceptual analysis, there is no justification for creating a new exception to the antitrust laws or for expending federal funds to create a new federal agency.

A careful study of the Supreme Court's reasoning in *BMI v. CBS*[172] reveals an approach to per se analysis which neither forbids economically desirable business practices nor violates the integrity of per se rules. Under the *BMI* analysis, a term such as "price fixing" denotes a general category of specific business practices which are so detrimental to competition that they always constitute unreasonable restraints of trade.[173] Each time the Court is faced with a new type of business practice it must determine whether it is the type of activity which should be included under a general category of per se violations.[174] If it is determined that the new business practice properly belongs in one of the general categories of forbidden activity, inquiry into its reasonableness in subsequent cases is unnecessary.[175] Thus, the Court's approach in *BMI v. CBS* wisely avoided the undesirable option of either automatically applying the per se rule to a broad range of business practices or making an exception to the rule.[176] This approach should be followed in future cases where the copyright and antitrust laws converge.

*Charles I. Knauss, Jr.**

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[172] 441 U.S. 1 (1979).

[173] *Id.* at 8-9.

[174] *Id.* at 9-10.

[175] *See* notes 29 through 35 and accompanying text *supra*.

[176] In examining the blanket license, the Court found benefits to both buyers and sellers, so that this business practice was made more than a "naked restraint of trade with no purpose except stifling of competition." 441 U.S. at 20 (quoting White Motor Co. v. United States, 372 U.S. 253 (1963)).

* An earlier draft of this comment was entered in the Nathan Burkan Memorial Competition.

RECENT DECISIONS

JURISDICTION—MOOTNESS—PUTATIVE CLASS ACTION NOT MOOTED BY TERMINATION OF NAMED PLAINTIFF'S SUBSTANTIVE CLAIM

Respondent[1] brought a class action[2] alleging that the Parole Release Guidelines[3] adopted by petitioner[4] were inconsistent with the Parole Commission Reorganization Act[5] and the United States Constitution. Respondent also questioned petitioner's procedures in applying the guidelines to his particular case.[6] He moved to certify a class consisting of all federal prisoners who were then or would later become eligible for parole.[7] The district court[8] denied this motion and granted summary judgment for petitioner.[9] Respondent appealed both the de-

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[1] John M. Geraghty was convicted of conspiracy to commit extortion and of making false declarations to a grand jury. United States Parole Comm'n v. Geraghty, 100 S. Ct. 1202, 1206 (1980).

[2] The class action is authorized by rule 23 of the Federal Rules of Civil Procedure. It permits a plaintiff to bring an action on behalf of himself and others without necessitating the joinder of the others. The prerequisites to the bringing of a rule 23 class action are that the class be so numerous that joinder is impractical, that there be questions of law or fact common to the class, that the named plaintiff's claims or defenses be typical of those of the class, and that the named plaintiffs be able to protect adequately the interests of the class. FED. R. CIV. P. 23(a). *See generally* Kane, *Standing, Mootness, and Federal Rule 23—Balancing Perspectives*, 26 BUFFALO L. REV. 83, 91 (1976) (class action prevents sheer numbers from precluding the assertion of legal rights).

[3] 28 C.F.R. § 2.20 (1979).

[4] The United States Parole Commission was created by Congress to promulgate the rules under which prisoners may be considered for parole. The Commission must, using several factors, determine that release of an inmate would be in the best interest of the public. 100 S. Ct. at 1206.

[5] 18 U.S.C. §§ 4201-4218 (1976).

[6] Respondent claimed that the guidelines were facially unconstitutional because they gave the Parole Commission the power to make sentence duration decisions, and thus impose punishment without due process of law. Geraghty v. United States Parole Comm'n, 429 F. Supp. 737, 741 (M.D. Pa. 1977), *rev'd and remanded*, 579 F.2d 238 (3d Cir. 1978), *aff'd in part, vacated and remanded in part*, 100 S. Ct. 1202 (1980).

[7] 100 S. Ct. at 1206.

[8] Respondent brought his action in the United States District Court for the District of Columbia, at which time he moved for class certification. Without ruling on that motion, the court transferred the case to the Middle District of Pennsylvania, the site of respondent's incarceration. *Id.*

[9] *Id.* at 1207.

nial of certification and the summary judgment, but before his appeal was heard he was released from prison.[10] Petitioner then moved to dismiss respondent's appeal as moot.[11] The United States Court of Appeals for the Third Circuit ruled that the denial of class certification was erroneous,[12] and that the claims of the unnamed members could survive the mooting of the claims of the named plaintiff.[13] The United States Supreme Court, on writ of certiorari, *held*, affirmed.[14] A putative class action is not rendered moot by the termination of the named plaintiff's claim, even when class certification has been denied, since plaintiff's personal stake in obtaining class certification is sufficient to appeal its denial.[15] *United States Parole Commission v. Geraghty*, 100 S. Ct. 1202 (1980).

A case becomes moot when there is no longer an actual controversy or adverse relationship between the plaintiff and defendant.[16] This situation may arise in several different ways. The lawsuit may be one in which, from its inception, the parties have been in collusion,[17] or subsequent events may have rendered an originally viable controversy moot.[18] When questions of law for which a plaintiff seeks a decision are

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[10] *Id.* Shortly after the appeal was filed, another prisoner, Becher, who had been denied parole in circumstances similar to respondent's, moved to intervene. The district court, on the ground that respondent's appeal had ended its jurisdiction over the case, denied this motion and Becher appealed the denial. The appeals of Becher and the respondent were consolidated. *Id.*

[11] *Id.*

[12] 579 F.2d at 244.

[13] *Id.* at 252.

[14] 100 S. Ct. at 1212.

[15] *Id.*

[16] Lord v. Veazie, 49 U.S. (8 How.) 251, 255 (1850); *see, e.g.*, Muskrat v. United States, 219 U.S. 346, 357 (1911) (court may only decide cases adversarily presented).

[17] Lord v. Veazie, 49 U.S. (8 How.) 251, 255 (1850); *see* Coxe v. Phillips, 95 Eng. Rep. 152, 152 (K.B. 1736) (parties in collusion to make a third party responsible for a debt).

[18] This may occur either by a change in the controlling law or by a change in the controlling fact situation. A change by statute, treaty, or judicial decision will generally moot the case. *See* Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 436 (1855) (congressional statute); *cf.* Dinsmore v. Southern Express Co., 183 U.S. 115, 120-21 (1901) (amended statute operated to grant plaintiff relief and thus moot the case). A change in the fact situation, either through passage of time, sale of the subject property, or performance of the act requested, may make the relief sought impossible for the court to grant. *See* Atherton Mills v. Johnson, 259 U.S. 13, 15-16 (1922) (child challenging the validity of child labor statute reached majority); Security Mut. Life Ins. Co. v. Prewitt, 200 U.S. 446, 449 (1906) (action seeking revocation of a license mooted by the expiration of that license). For a more complete discussion, see Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. PA. L. REV. 125, 132-35 (1945) (a change in a law

hypothetical, with no basis in fact, a court may not review them.[19] Finally, events intervening between the commencement of the action and the time of actual adjudication or review may make the granting of relief impossible.[20]

The early English concept of mootness was articulated by the judiciary, which ruled in 1736 that an attempt to utilize the subterfuge of a hypothetical lawsuit constituted a contempt of court.[21] In the United States, the rationale used originally by the Supreme Court to explain its refusal to hear a moot case was the common law doctrine that courts cannot decide a question in the abstract or in the absence of a true dispute.[22] More recently, however, the Court has relied on Article III, section two of the United States Constitution, which requires that there be a case or controversy[23] in the constitutional sense before a ruling on the merits may be obtained.[24] When this requirement is not met, the court has no jurisdiction and cannot decide the case.[25] Like all

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may moot the case or a change in facts may deny relief).

[19] *E.g.*, Willing v. Chicago Auditorium Ass'n, 277 U.S. 274, 289-90 (1928) (lessor sought a court interpretation of a term in a lease); Hayburn's Case, 2 U.S. (2 Dall.) 409, 409 (1796) (attorney general sought a writ of mandamus in the name of a fictitious person to compel congressional action).

[20] *E.g.*, Mills v. Green, 159 U.S. 651, 657-58 (1895) (citizen's action to compel clerk to register him as a qualified voter mooted by the passing of the election).

[21] Coxe v. Phillips, 95 Eng. Rep. 152 (K.B. 1736); *accord*, *In re* Elsam, 107 Eng. Rep. 855, 856 (K.B. 1824) (attorney fined for contempt); Hoskins v. Berkely, 100 Eng. Rep. 1086, 1086 (K.B. 1791)(dictum).

[22] Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373, 374 (1975); *see* Mills v. Green, 159 U.S. 651, 653 (1895) (courts must decide actual controversies); California v. San Pablo & T. R.R., 149 U.S. 308, 314 (1893) (courts may not decide moot questions). *See generally* Diamond, *supra* note 18, at 125 (court may not render a decision in a moot case).

[23] Note, *supra* note 22, at 374-75. The case or controversy requirement has been cited by the Supreme Court to explain its refusal to render a judgment in a collusive suit or a moot case, as well as its refusal to issue advisory opinions or answer political questions. 41 HARV. L. REV. 232, 232-33 (1927). The essential element of a case or controversy is "interested parties asserting adverse claims." *Id.* at 233. *See also* Diamond, *supra* note 18, at 125-26 (a lawsuit which is moot cannot satisfy the case or controversy requirement).

[24] In order for the controversy to be "justiciable," as distinguished from a hypothetical or moot difference of opinion, it must be definite and concrete, and be between two adverse parties. Bledsoe, *Mootness and Standing in Class Actions*, 1 FLA. ST. U.L. REV. 430, 431 (1973). The Court first expressly relied on Article III as a basis for not ruling on moot cases in Liner v. Jafco, 375 U.S. 301, 306 n.3 (1964), but gave no reason for its reliance. The Court has, however, relied on Article III without comment in its subsequent decisions. For more examples of this trend, see Note, *supra* note 22, at 375 n.12.

[25] *E.g.*, DeFunis v. Odegaard, 416 U.S. 312, 317 (1974) (the requirement of controversy was not met where plaintiff who had previously been denied admission to law

general rules, however, the doctrine of mootness is subject to exceptions. While a viable controversy usually means a present controversy, there are situations in which a court will grant relief even when factors have intervened that would ordinarily render the case moot.[26] The Supreme Court has devised two tests under which the maintainability of a suit may be preserved.[27] The first of these was articulated by the Court in *Southern Pacific Terminal Co. v. I.C.C.*[28] Under this test, if a dispute which is claimed by the defendant to have become moot is "capable of repetition, yet evading review,"[29] the court may retain jurisdiction in order to rule on the merits of the case.[30] The second test, the "mere possibility" test, was delineated in *United States v. W. T. Grant Co.*,[31] in which the Court noted that voluntary cessation of the defendant's conduct would not render the case moot if there was a reasonable expectation that the wrong complained of would be repeated.[32]

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school was subsequently admitted); North Carolina v. Rice, 404 U.S. 244, 246 (1974) (court's inability to review moot cases comes from Article III of the Constitution). *See generally* C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533 (1975) (suit must be viable at all stages); Diamond, *supra* note 18, at 125 (mootness is a jurisdictional limitation). The case or controversy requirement serves two important functions: it prevents the needless expenditure of limited judicial resources, and, more importantly, it assures that all lawsuits are conducted in a true adversarial context. Note, *Does Mooting of the Named Plaintiff Moot a Class Suit Commenced Pursuant to Rule 23 of the Federal Rules of Civil Procedure*? 8 VAL. U.L. REV. 333, 335-36 (1973).

[26] Bledsoe, *supra* note 24, at 434.

[27] *Id.*

[28] 219 U.S. 498 (1911).

[29] *Id.* at 515. This case dealt with short term orders, issued by the Interstate Commerce Commission, which would usually expire before any one litigant could bring a suit to completion. The Court reasoned that the plaintiff's rights were being regulated by a commission that very possibly would never have to answer for its acts if the expiration of each order rendered each successive case moot. *Accord*, Moore v. Ogilvie, 394 U.S. 814, 816 (1969) (dispute involving nomination procedure held not mooted, although election was completed, because the dispute would arise again at the time of the next election).

[30] This concept has been used in a wide variety of cases to enable the Court to remedy a recurring wrong. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 774 (1978) (various corporations allowed to continue to litigate a statutory ban on advertising in referendum elections even though the election had been completed); United States v. New York Tel. Co., 434 U.S. 159, 165 n.6 (1977) (litigation involving an F.B.I. wiretap order allowed to continue although the wiretap operation itself had ceased); Super Tire Eng'r Co. v. McCorkle, 416 U.S. 115, 125 (1974) (employer sought to have striking employees removed from unemployment rolls; action not mooted by end of strike since there was likelihood of recurrence); *cf.* Weinstein v. Bradford, 423 U.S. 147, 148 (1975) (court recognized doctrine, but stated that the threatened recurrence must be to the plaintiff himself, not to a hypothetical third person).

[31] 345 U.S. 629 (1953).

[32] *Id.* at 632-33. The test is based on the fact that, in the absence of any restrictions,

However, a mere possibility of recurrence is not enough; there must be an apparent danger of the violation's recurrence.[33] Additionally, even when the major claim or point of contention has disappeared,[34] any remaining claims enable the court to retain jurisdiction.[35]

The class action,[36] a suit brought by one or more persons suing on his own or their behalf and on behalf of other persons who have similar grievances,[37] presents unique mootness problems. Since a class action

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the defendant is free to resume the offending practice, notwithstanding his assertions of good faith. The Court looked to the facts surrounding the case to see if the defendant retained control sufficient to make it likely that the challenged conduct would be repeated. *Id.* at 633. Like the first test, the second test is applicable only between the same plaintiff and defendant. *Id.* at 632. *See* Bledsoe, *supra* note 24, at 434-36 (possible bad faith of defendant may cause "mere possibility" test to be invoked).

[33] 345 U.S. at 633.

[34] *See* note 18 *supra.*

[35] *See* Powell v. McCormick, 395 U.S. 486 (1969). Congressman Adam Clayton Powell claimed that the 90th Congress had unconstitutionally denied him his seat in the House of Representatives and included in his action a claim for back salary. He had been the object of an investigation into certain questionable spending practices of the Committee on Education and Labor, of which he was chairman. It was determined that he and others had received improper travel expenses and that his wife was receiving illegal salary payments. He was stripped of his seat in the House. *Id.* at 489-93. The defendants contended that the 90th Congress was not a "continuing body," *id.* at 495, and that its termination and Powell's subsequent seating by the 91st Congress had mooted his constitutional claim, thus mooting the case. However, the Court found that the additional claim of back salary was still very much in dispute. This dispute provided the required case or controversy, *id.* at 496-97, and allowed the Court to reach the constitutional issue that would otherwise have been moot. *See, e.g.*, Roudebush v. Hartke, 405 U.S. 15, 19 (1972) (Senator Hartke conditionally seated by Senate after a disputed election; did not moot the controversy since his seating was conditional on the results of court action and a recount). The Court has been willing to hear cases in which the collateral dispute was more speculative. *See* Note, *supra* note 22, at 379 (continuing adverse effect on the plaintiff necessary).

[36] *See* note 2 *supra.* For an exhaustive discussion of a class action, see *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318 (1976).

[37] The class action originated in the English court of chancery, Note, *supra* note 25, at 336 n.20, as a method of circumventing the requirement of the law courts that each action be brought separately. *See* Z. CHAFEE, SOME PROBLEMS OF EQUITY 201 (1950). Although such an action was undeniably more convenient, it conflicted with well-established legal principles, chief among them the requirement that each man have his day in court. *Id.* at 203. The court in Cockburn v. Thompson, 33 Eng. Rep. 1005, 1005 (Ch. 1809), neatly sidestepped this hurdle with its observation that where it is practically impossible to bring all interested parties before the court, convenience dictates a different policy. The courts in the United States followed the English policy of allowing the class action, but first allowed it only in equity. Note, *supra* note 25, at 336 n.20. However, when the distinction between law and equity was removed by the Federal Rules of Civil Procedure, the class action became available in actions at law as well. *Id.* For a

is composed of many individual controversies, there is always the possibility that at least one of them will become moot.[38] In a normal two-party suit, mootness would require dismissal of the proceeding.[39] However, the courts have found on occasion that the class action can survive the demise of the named plaintiff's claim. As the courts have tended to treat moot class actions somewhat differently, it is helpful to divide them into three categories.[40] (1) The entire class may have its claims mooted, necessarily mooting the entire action[41] since there is no

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more thorough discussion of the early history and development of the class action, see Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977).

The class action should be distinguished from the public interest action. While each is a private suit in the public interest, the class action is premised on the theory that all persons with an interest in the litigation are before the court. The public interest action, however, does not resort to that fiction. The plaintiff represents only himself, but speaks for the general public. Perhaps the most significant difference between the two forms of action is that the class action plaintiff must show a violation of a substantive, legally protected individual right, while the public action plaintiff may rely on the interest of the public at large. Homburger, *Private Suits in the Public Interest in the United States of America*, 23 BUFFALO L. REV. 343, 387-88 (1974). This difference makes the question of standing to sue a most important one in the area of public interest litigation. The earlier doctrine was that the plaintiff had to show that the defendant's conduct had deprived him of a legally protected right. *See, e.g.*, Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 693 (1949) (in order to have standing to challenge constitutionality, the plaintiff must show a legal right); Stark v. Wickard, 321 U.S. 288, 290 (1944) (tenant farmers had a legal right under Agricultural Marketing Agreement Act); Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940) (in order to have standing, must show a legal right granted by constitutional legislation); Tennessee Elec. Power Co. v. T.V.A., 306 U.S. 118, 137 (1939) (right must be legally protected, contractual, statutory, or other). However, the Court has, in recent years, turned more toward protecting the general public interest and allowed the plaintiff more latitude in the area of standing in order to enable valid grievances to be heard. *See, e.g.*, FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476-77 (1940) (owners of a radio station had standing to protect the public interest in adequate radio service); *cf.* Barlow v. Collins, 397 U.S. 159, 164-65 (1970) (tenant farmers allowed to challenge an act of the Secretary of Agriculture); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 155-56 (1970) (competitors of national banks permitted to sue under Administrative Procedure Act). *See generally* Homburger, *supra*, at 390-93 (court uses public interest as criterion in standing questions); Kane, *supra* note 2, at 90-91 (class action functioning as a public interest suit).

[38] Comment, *A Search for Principles of Mootness in the Federal Courts* (pt. 2), 54 TEX. L. REV. 1289, 1320 (1976).

[39] *E.g.*, Brockington v. Rhodes, 396 U.S. 41, 43 (1969) (plaintiff who protested candidate certification requirement had case mooted by election).

[40] This approach is suggested in Comment, *supra* note 38, at 1320. These are all the possible permutations of the problem of mootness, though the categories are rather large.

[41] *E.g.*, Hall v. Beals, 396 U.S. 45, 48 (1969). In this case plaintiffs brought a class

remaining basis for jurisdiction. (2) The claims of some of the named plaintiffs may become moot, with others remaining viable. In this situation, the court retains jurisdiction[42] since there is still an adversary relationship. Those whose claims have been mooted simply do not remain as parties. (3) Finally, the claims of all named plaintiffs may become moot, but those of all or most of the members of the class remain.[43] It is in this third situation that the doctrine of mootness becomes the most difficult to apply.[44]

The courts, prior to 1975, generally held that the mooting of the named plaintiff's claim did not render the action itself moot, but these decisions provided little or no explanation of how or why they had been reached.[45] However, without using formal guidelines, the courts seemed to follow either of two views in deciding the question of mootness.[46] The first view required the named plaintiff to have a stake in the outcome of the case.[47] Strict adherence to this view caused many class actions to be dismissed upon the mooting of the named plaintiff's claim or a finding that the named plaintiff had never belonged to the class.[48] The second view was that a personal stake on the part of the

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action challenging a state's six month durational residency requirement for voting. By the time the case reached the Supreme Court, the national election had been held, and in addition the residency requirement had been reduced to two months. The Court dismissed the suit as moot, reasoning that the original requirement, which was the subject matter of the suit, was nonexistent, and also that the plaintiffs, never having been affected by the new requirement, had suffered no injury.

[42] Comment, *supra* note 38, at 1321. The author points out that this constitutes only a misjoinder problem. *See, e.g.*, Goosby v. Osser, 409 U.S. 512, 514 n.2 (1973) (one defendant to the suit admitted that plaintiffs were due the relief that they requested, but other defendants vigorously denied the fact).

[43] Comment, *supra* note 38, at 1321.

[44] *Id.* Prior to 1975, the Supreme Court had not taken a definitive position on the proper disposition of a case in which the named plaintiff had lost his cause of action. When faced with the opportunity to do so in Indiana Employment Security Div. v. Burney, 409 U.S. 540, 541-42 (1973), the Court instead vacated and remanded the case so that the lower court could decide the issue of mootness. Since *Burney* involved the defendant's mooting the case by voluntarily meeting the named plaintiff's demands, it appeared that the Court gave its tacit approval of that practice. *But see* Deposit Guar. Nat'l Bank v. Roper, 100 S. Ct. 1166, 1174 (1980) (Court expressly rejected this idea). *See generally* Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 DUKE L.J. 581-82 (discussion of inconsistencies of lower court decisions during this time).

[45] Kane, *supra* note 2, at 100.

[46] *See* Comment, *supra* note 44, at 583.

[47] *Id.*

[48] *See, e.g.*, McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151, 163-64 (1914) (plaintiffs failed to allege facts sufficient to show that they had suffered any injury). It is im-

named plaintiff was unnecessary to enable the class action to continue.[49] This latter view was more prevalent, but there was no firm articulation of guidelines to be followed in making this important determination. In 1975, the Supreme Court, in *Sosna v. Iowa*,[50] clarified the matter when it held that after class certification, the unnamed parties acquired a legal status separate from that of the named plaintiff.[51] In *Sosna*, the plaintiff questioned the constitutionality of Iowa's one year residency requirement for divorce proceedings.[52] She brought her suit in the form of a class action on behalf of herself and all others whose desire to obtain a divorce was frustrated by the one year requirement.[53] By the time the case reached the Supreme Court, the named plaintiff had satisfied the requirement,[54] but the Court determined that the practical effect of a dismissal on mootness grounds would be to cripple this type of class action.[55] The fact that other class members would be

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portant to note that in almost all instances in which a class action was found to be mooted, the intervening event that rendered it moot occurred before the putative class was certified. *See, e.g.*, Watkins v. Chicago Hous. Auth., 406 F.2d 1234, 1237 (7th Cir. 1969) (named plaintiff's claim mooted prior to certification, court could not find an unnamed plaintiff with a like injury). At least one court dismissed as moot an action in which there had been a class certification and adjudication at the trial level, but the named plaintiff's claim had been mooted during the appellate process. Norman v. Connecticut State Bd. of Parole, 458 F.2d 497, 499 (2d Cir. 1972). *See generally* Bledsoe, *supra* note 24, at 439-40 (discussion of similar cases); Comment, *supra* note 44, at 584-86 (justifications for following this procedure).

[49] Kane, *supra* note 2, at 100; *see, e.g.*, Richardson v. Ramirez, 418 U.S. 24, 40 (1974) (continuing controversy between unnamed class members and defendant showed that the case was still viable). This view allows the named plaintiff to continue to represent the class in the litigation as though his personal stake in the outcome were still intact. *See* Moss v. Lane Co., 471 F.2d 853, 855 (4th Cir. 1973) (if plaintiff was a member of the class at the beginning of the suit, and was approved as a representative, then the subsequent mooting of his claim will not end his right to litigate the case); Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968) (because of possibility that defendant would voluntarily moot plaintiff's claim, this mootness would not affect the claims of unnamed plaintiffs). *See also* Comment, *supra* note 44, at 590 (loss of named plaintiff's personal claim should not affect class action); Note, *supra* note 22, at 390-92 (discussion of *Ramirez*).

[50] 419 U.S. 393 (1975).

[51] *Id.* at 399. This was the Court's first intimation that the unnamed parties had some inchoate rights of their own.

[52] *Id.* at 395-96.

[53] *Id.* at 397.

[54] *Id.* at 398. Although, by the time of this appeal, plaintiff had resided in Iowa long enough to satisfy the requirement, she had previously traveled to another state and was granted a divorce. Either would have mooted the action with regard to the named plaintiff. *Id.* at n.7.

[55] *Id.* at 401 n.9. The Court based its holding that the case was not moot on two

bound by the judgment was recognized by the Court and played an important part in the ruling.[56] However, the Court placed a premium on proper class certification, as evidenced by its decision only one month later in *Board of School Commissioners v. Jacobs*.[57] This case was a class action by high school students questioning the constitutionality of school board regulations affecting a high school newspaper. The Court, in holding that the case was rendered moot by the graduation of the named plaintiffs,[58] stressed the insufficiency of certification by the district court.[59]

In 1976, the Court followed its holding in *Sosna* with the ruling in *Franks v. Bowman Transportation Co.*[60] that a properly certified class action would not be mooted by the mooting of the named plaintiff's claim, so long as an adversary relationship remained.[61] The named plaintiff in *Bowman* alleged racially discriminatory hiring practices.[62] However, prior to final adjudication by the district court, he was hired[63] and his personal claim became moot. The Supreme Court held that the personal stake of the unnamed class members enabled the action to survive.[64] The following year, in *United Airlines, Inc. v. McDonald*,[65] the Court addressed the problem caused by a denial of class certification and the subsequent mooting of the named plaintiffs' claim

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factors. First, despite the mootness of the named plaintiff's claim, there was still a live controversy between the defendant and other class members; and second, this case fell under the "capable of repetition, yet evading review" doctrine with regard to the other class members. *Id.* at 399-400. This represented a continuation of the judicial trend toward applying that doctrine to class actions. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975) (named plaintiffs were prisoners challenging the constitutionality of pretrial detention; their subsequent conviction mooted the case as to them, but not as to other prisoners); Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972) (plaintiff satisfied three month residency requirement for voting, but other class members still affected); Bower v. Vaughan, 313 F. Supp. 37, 40 (D. Ariz. 1970) (regulation would not affect plaintiff again, but would affect other members of the class), *aff'd mem.*, 400 U.S. 884 (1970).

[56] 419 U.S. at 399.

[57] 420 U.S. 128 (1975).

[58] *Id.* at 129. The majority was silent, however, on the question of the effect that the school's policy would have on future publications.

[59] *Id.* The lower court had not identified or described the class.

[60] 424 U.S. 747 (1976).

[61] *Id.* at 754-55. In *Bowman*, the Court found that the class was properly certified, thus distinguishing it from *Jacobs*. *See* notes 57 through 59 and accompanying text *supra*.

[62] 424 U.S. at 750-51.

[63] *Id.* at 752.

[64] *Id.* at 755.

[65] 432 U.S. 385 (1977).

by a favorable judgment on the merits.[66] After the entry of judgment, one of the putative class members moved to appeal the denial of class status,[67] and the Court affirmed her right to do so.[68] Thus the Court, at least partially, removed the requirement of class certification as a prerequisite to appeal after the case has become moot with regard to the named plaintiff.

In *Deposit Guaranty National Bank v. Roper*,[69] the Supreme Court extended the *McDonald* right to appeal the denial of certification to named plaintiffs who had prevailed on the merits of their case. The plaintiffs in *Roper* brought a class action alleging usurious finance charges on the part of the defendant bank,[70] but the district court refused to certify the class.[71] The defendant then tendered to the plaintiffs the maximum amount recoverable, and the district court, over plaintiffs' objections, entered a judgment in their favor.[72] When the named plaintiffs appealed the denial of class certification, the bank contended that the case was mooted by the entry of judgment.[73] The Supreme Court held that the entry of judgment over the named plaintiffs' objections did not moot their private cause of action since they retained an individual interest in the litigation, and they were allowed to appeal the denial of class certification.[74]

In the instant case, the Court reasoned that since the named plaintiff's class action actually consisted of two issues, the substantive claim and the certification claim,[75] the mooting of the substantive claim would not automatically render the entire action moot.[76] Since rule 23 of the Federal Rules of Civil Procedure gives the named plaintiff a right to class certification if all requirements are met,[77] the Court

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[66] *Id.* at 388-89.

[67] *Id.* at 390. The named plaintiffs had attempted an interlocutory appeal of the denial of certification, but the court of appeals denied their motion. Upon entry of judgment in their favor, they ceased to litigate. The Court allowed the unnamed plaintiff to intervene after judgment to appeal the denial of certification. *Id.* at 395.

[68] *Id.* at 395.

[69] 100 S. Ct. 1166 (1980).

[70] *Id.* at 1168.

[71] *Id.* at 1169.

[72] *Id.* The entry of judgment was based on defendant's tender.

[73] *Id.*

[74] *Id.* at 1174-75. The Court found the required individual interest in the plaintiffs' desire to share the costs of litigation with the putative class. *Id.* at 1173-74. For a further analysis of *Roper*, see Note, *Can Defendants Use Mootness Doctrine To Buy Off Class Actions?*, 36 WASH. & LEE L. REV. 167 (1979).

[75] United States Parole Comm'n v. Geraghty, 100 S. Ct. 1202, 1211 (1980).

[76] *Id.* at 1211.

[77] *Id.* at 1212. The Court stated that "[t]his 'right' is more analogous to the private

reasoned that he could maintain an appeal of its denial if he retained a personal stake in the outcome of the action.[78] The Court then stated that the purpose of the personal stake requirement is to assure that the action is in a form that is capable of judicial resolution,[79] and the requirements of such a form are that there be real, factual issues vigorously argued by opposing parties. Since the named plaintiff fulfilled these requirements, the personal stake requirement was satisfied, though not in its traditional meaning.[80] The Court concluded that since the named plaintiff possessed a sufficient personal stake in the action, the mooting of his substantive claim did not prevent his obtaining an appeal on the class certification issue.[81]

Justice Powell, writing for the dissent,[82] agreed that there was indeed a viable, justiciable issue,[83] but, since the named plaintiff had no true interest of his own at stake, he should be barred from litigating the action.[84] He emphasized that since the "right" embodied in rule 23[85] is only a procedural claim,[86] which is not a "claim" in the ordinary sense, the plaintiff could not assert a personal interest in it; it was insufficient to confer jurisdiction upon the Court when there was no true

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attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement." *Id.* The dissent pointed out that prior to the instant case, the Court consistently had rejected any opportunity to endorse "public actions." *Id.* at 1222 (Powell, J., dissenting). The extent to which the court will allow the private attorney general concept to supplant the traditional requirement of a "personal stake" remains unclear. In Satterwhite v. City of Greenville, 578 F.2d 987 (5th Cir. 1978), *vacated and remanded*, 100 S. Ct. 1334 (1980), *remanded*, 634 F.2d 231 (5th Cir. 1981), the Fifth Circuit ruled that because the named plaintiff in a putative class action had never been a member of the putative class she lacked the requisite nexus with the class. Although that ruling would not seem to clash with the holding in the instant case, the Supreme Court vacated and remanded for further consideration in light of *Geraghty* and *Roper*. On remand, the Fifth Circuit concluded that the record in the case did not allow it to determine whether a "live and continuing controversy" existed and remanded the case to the district court. 634 F.2d at 231.

[78] 100 S. Ct. at 1211.

[79] *Id.* at 1212.

[80] *Id.*

[81] *Id.*

[82] Chief Justice Burger, Justice Rehnquist, and Justice Stewart joined in the dissent.

[83] 100 S. Ct. at 1215.

[84] *Id.*

[85] *See* note 77 *supra*.

[86] Justice Powell contended that a procedural right could come into play only after the Court has established that it has jurisdiction. It could not be used to give the Court jurisdiction. 100 S. Ct. at 1221-22.

Article III case or controversy, but only a lively dispute.[87]

The instant decision is significant because of the unprecedented lengths to which the Court appears willing to go to find the requisite "personal stake" necessary to keep the action alive. While previous cases had, with varying degrees of rigidity, required the named plaintiff to have some tangible personal interest in the outcome of the action[88] or, alternatively, required a valid certification of an identifiable class,[89] the instant case required only a continuing controversy over some aspect of the litigation.[90] The Court reached this conclusion only after a tortuous circumnavigation of the doctrine of mootness. After unearthing a "right" to a class action, the majority determined that a procedural claim, if it is vigorously contested, can fulfill the personal stake requirement by satisfying what the Court found to be the purpose of the requirement, which is to present justiciable disputes.[91] By allowing this to suffice, however, the Court seems to obviate the requirement itself. As a practical matter, only rarely would a named plaintiff whose substantive claim was mooted be unable to meet the Court's nontraditional approach to the personal interest test, since by appealing the denial of certification he can satisfy the vigorous advocacy criterion.

Although the Court attempted to equate the personal interest in the instant case with that found in *Roper*,[92] the two differ in one important respect. *Roper* relied on a financial interest of the named plaintiffs,[93] which is clearly distinguishable from the elusive personal stake discerned in *Geraghty*. Perhaps the instant approach would have been more palatable had it been articulated in a case with a fact situation like that in *Gerstein v. Pugh*,[94] in which there was more clearly a continuing adverse relationship.[95] However, notwithstanding the serpentine reasoning employed, the decision in the instant case will probably be a helpful step in the quest for judicial economy, since it is more likely that an action already in progress will be allowed to pro-

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[87] *Id.* at 1222 n.16.

[88] *See* notes 47, 48 and accompanying text *supra*.

[89] *See* notes 50 through 59 and accompanying text *supra*.

[90] 100 S. Ct. at 1212. It is this point that the dissent found particularly objectionable. *Id.* at 1222. *See* text accompanying notes 85 through 87 *supra*.

[91] *See* text accompanying notes 77 through 80 *supra*.

[92] 100 S. Ct. at 1211.

[93] *See* note 74 *supra*.

[94] 420 U.S. 103 (1975); *see* note 55 *supra*.

[95] Though the named plaintiffs' claim had become moot, their attorney was a public defender, who represented other class members. 420 U.S. at 110 n.11. The continuing controversy there would have fit more symmetrically, and plausibly, into the Court's reasoning.

ceed. The Article III case or controversy requirement, though bruised, emerged intact since the plaintiff must demonstrate at the outset that he has suffered some real injury and that he does in fact represent a class that has suffered like injury.[96]

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[96] *See* note 48 *supra*. *But see* note 77 *supra*. The instant decision seems to find its justification in the fact that the named plaintiff did, at one time, have a nexus with the putative class. The thrust of the majority opinion was that the subsequent mooting of the named plaintiff's claim was no bar to his continued representation of the interests of the class. Nowhere in the opinion did the majority intimate a further withdrawal from this position. Nevertheless, by vacating and remanding *Satterwhite*, the Court may be hinting at even more relaxed requirements for class representation, using the instant decision as a springboard.

Constitutional Law—Jurisdiction—To Be Subject To Forum State's Personal Jurisdiction Foreign Corporation Must Reasonably Expect To Defend Suit

Petitioners[1] sought a writ of prohibition to restrain the district court[2] from exercising in personam jurisdiction over them in a products liability suit brought by respondents[3] in state court. Respondents alleged that their injuries were caused by a defect in the design and placement of their car's fuel system and brought suit[4] under Oklahoma's long arm statute.[5] Petitioners, both New York corporations, contended that their rights under the due process clause of the fourteenth amendment[6] had been violated because they did not do business in or have minimum contacts[7] with Oklahoma. The district court held that the constitutional rights of the petitioners had not been

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[1] Petitioner World-Wide Volkswagen Corporation is a regional distributor of Audi vehicles, parts, and accessories and serves retail dealers in New York, Connecticut, and New Jersey. Petitioner Seaway Volkswagen, Inc., is a retail dealer selling Audi vehicles, parts, and accessories in Massena, New York. World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559, 562-63 (1980).

[2] Respondent Charles S. Woodson is the district judge for Creek County, Oklahoma where this action originated. *Id.* at 562-63.

[3] This suit arose out of a wreck in Oklahoma in which respondents Kay and Harry Robinson were involved. Respondents' Audi, purchased from Seaway, was hit from the rear and burst into flames. Kay Robinson and her two children were injured severely in the ensuing fire. *Id.* at 562. Kay Robinson sued to recover for her personal injuries, and Harry Robinson sued as father and next friend for recovery for the injuries to his children. *Id.* at 562 n.2.

[4] Joined as defendants were the car's manufacturer, Audi NSU Auto Union Aktiengesellschaft; its importer, Volkswagen of America, Inc.; and petitioners World-Wide and Seaway. *Id.* at 562. *See* note 1 *supra.*

[5] The Oklahoma statute provides that:

> A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's . . . causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state . . . .

Okla. Stat. tit. 12, § 1701.03(a)(4) (Supp. 1979-1980).

[6] U.S. Const. amend. XIV, § 1.

[7] The requirement of minimum contacts with a state serves both to prevent the possibility of litigation in an inconvenient forum and to ensure that state courts do not interfere with the authority of other state court systems. 100 S. Ct. at 564. For a further discussion, see notes 38 through 44 and accompanying text *infra.*

violated.[8] On appeal, the Supreme Court of Oklahoma affirmed the district court decision and refused to issue a writ of prohibition.[9] On writ of certiorari the United States Supreme Court, *held,* reversed. To be subject to in personam jurisdiction, a foreign corporation must reasonably expect to defend a suit in the forum state. *World-Wide Volkswagen Corp. v. Woodson,* 100 S. Ct. 559 (1980).

Under the due process clause of the fourteenth amendment,[10] a state court cannot render a valid judgment unless the court has proper in personam jurisdiction[11] over the parties to the suit.[12] At common law, in the absence of consent by the defendant,[13] jurisdiction could be obtained only if the defendant was within the boundaries of the sovereign.[14] This physical power theory[15] was relied on in *Pennoyer v.*

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[8] 100 S. Ct. at 563.

[9] 585 P.2d 351 (Okla. 1978), *rev'd,* 100 S. Ct. 559 (1980).

[10] U.S. CONST. amend. XIV, § 1.

[11] Traditionally there have been three types of judgments: (1) in personam; (2) in rem; and (3) quasi in rem. A judgment in personam imposes a personal obligation on an individual and is based on the court's power over the defendant. A judgment in rem is a judgment rendered against property over which the court has power. Questions of ownership are not involved, and the court may not have power over all parties having an interest in the property. A quasi in rem judgment determines the ownership of the property at issue. RESTATEMENT OF JUDGMENTS, introduction, at 5-8 (1942).

[12] *See, e.g.,* Kulko v. Superior Court, 436 U.S. 84, 101 (1978) (action by divorced father to vacate order denying motion to quash service of summons for lack of in personam jurisdiction); Pennoyer v. Neff, 95 U.S. 714, 733 (1877)(action by nonresident defendant to set aside default judgment for lack of in personam jurisdiction). For a further discussion of these cases, see notes 16 through 23, 62 through 70, and accompanying text *infra.*

[13] Since the defendant can always waive lack of in personam jurisdiction as a defense, actual consent has always been a common law basis for jurisdiction. *See generally* Note, *Developments in the Law—State Court Jurisdiction,* 73 HARV. L. REV. 909, 916 (1960).

[14] In order for early common law courts to exercise jurisdiction over unwilling parties, the parties or property in question had to be within the territory. *See, e.g.,* Emanuel v. Symon [1908] 1 K.B. 302 (1907) (C.A.) (partners in a gold mine in Australia filed suit against an ex-partner residing in England after the partnership was dissolved and a deficit was found); Singh v. Faridkote, [1894] A.C. 670 (P.C. 1894) (jurisdiction denied in a suit by the Rajah to enforce a judgment issued in plaintiff's native state against appellant, a resident of another state). *See generally* Note, *supra* note 13, at 915 (quoting J. STORY, CONFLICT OF LAWS § 539 (8th ed. 1883)) (earliest common law theory was presence which required person to be within the territory).

[15] The physical power theory required that the defendant be physically present within a state before that state's courts could assert jurisdiction. *See generally* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 133 (2d ed. 1980) (presence of defendant required in the absence of consent). Justice Holmes observed that "[t]he foundation of jurisdiction is physical power . . . ." McDonald v. Mabee, 243 U.S. 90, 91 (1917), *quoted*

Neff,[16] which provided the foundation for the modern law of personal jurisdiction.[17] *Pennoyer* concerned an Oregon judgment[18] against Neff, a nonresident who owned land in Oregon. Pursuant to Oregon law, Neff was given only publication notice of the suit, and a default judgment was subsequently rendered in favor of Mitchell.[19] The United States Supreme Court held that constructive service of process for in personam actions against nonresidents violated the due process clause of the fourteenth amendment.[20] Therefore, any judgment rendered without personal service would be void[21] and, as such, not entitled to full faith and credit by other states.[22] As applied to corporations, which were deemed to have legal existence only within the boundaries of the state of incorporation,[23] the physical power theory proved impractical.[24]

As corporate activity became interstate in nature, it became necessary for states to create methods of gaining personal jurisdiction over foreign corporations. The first theory to evolve was the consent theory[25] under which a foreign corporation's right to transact business

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in R. WEINTRAUB, *supra*, at 133.

[16] 95 U.S. 714 (1877).

[17] *See* Shaffer v. Heitner, 433 U.S. 186, 198-99 (1976).

[18] Mitchell sued Neff for unpaid attorney fees, and a judgment for less than $300 was rendered. 95 U.S. at 719.

[19] *Id.* at 719-20. Neff sued to regain possession of his land after it was sold to Pennoyer to satisfy the default judgment. *Id.* at 719.

[20] *Id.* at 722. Justice Field held that a state's power to exercise jurisdiction over persons and property was limited by two "principles of public law." The first principle was "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." The second principle was "that no State can exercise direct jurisdiction and authority over persons or property without its territory." *Id. See* U.S. CONST. amend. XIV, § 1.

[21] 95 U.S. at 733-34.

[22] "[I]n order to entitle the judgment rendered in any court of the United States to the full faith and credit mentioned in the Constitution, the court must have had jurisdiction not only of the cause, but of the parties . . . ." *Id.* at 731.

[23] *E.g.*, Paul v. Virginia, 75 U.S. (8 Wall.) 168, 181 (1868) (upholding Virginia statute requiring insurance companies to deposit a bond with the state as a condition of doing business in the state); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839) (suit in Alabama by a bank incorporated in Georgia against an Alabama citizen on bills of exchange protested for nonpayment). This principle was extended to preclude suits against corporations outside the state of their incorporation. 75 U.S. (8 Wall.) at 181.

[24] The corporation could claim that it had not consented to be sued. Additionally, the highest officer in a corporation had to be served with process in order to obtain jurisdiction over the corporation, but service had to be made within the forum state. *See* Note, *supra* note 13, at 919.

[25] In 1855, the Supreme Court approved the consent theory. Lafayette Ins. Co. v.

within the state was conditioned[26] on the corporation giving its implied or expressed[27] consent to being sued in the state.[28] Later, courts relied on the presence theory[29] to gain personal jurisdiction[30] over foreign

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French, 59 U.S. (18 How.) 404, 407 (1955) (suit in Ohio against an Indiana insurance company to collect on an insurance policy for losses by fire). This theory was last used by the Supreme Court in 1933. Washington v. Superior Court, 289 U.S. 361, 364-65 (1933) (suit instituted in Washington against a Delaware corporation after its withdrawal from the state; process served on Washington's Secretary of State).

[26] The conditions that a state could impose on a corporation could not be illegal, unconstitutional, or contrary either to the rules of "public law," *see* note 20 *supra*, which protect the jurisdictional power of one state from encroachment by other states, or the "principle of natural justice" which grants an accused the right to defend himself. Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 407 (1855). Specifically, a state could require a corporation, as a condition of transacting business in the state, to stipulate that, in any litigation arising out of its activities in the state, it would accept as sufficient service of process on its agents. St. Clair v. Cox, 106 U.S. 350, 356 (1882) (agent who receives service of process on behalf of a corporation must be appointed to act in the forum state). An agent may receive service of process on behalf of a corporation if he is in "such relation to the company that the State may designate him for that purpose." Commercial Mut. Accident Co. v. Davis, 213 U.S. 245, 255 (1909) (insurance company's agents who had authority to settle claims, deemed to be able to receive service of process on behalf of the company for suits connected with insurance claims); *cf.* Wuchter v. Pizzutti, 276 U.S. 13, 19 (1928) (Secretary of State as agent for nonresidents involved in auto accident in forum state).

[27] *E.g.*, Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 95-97 (1917) (express authority for corporation to do business in state after the corporation appointed an agent); Simon v. Southern Ry., 236 U.S. 115, 131-32 (1915) (corporation not complying with a state's statute to appoint an agent held to have implied its consent to be sued only for suit arising in the state).

[28] As the number of automobiles increased, the number of injuries caused by automobile accidents involving out-of-state motorists also increased. It became necessary for states to have a method of gaining in personam jurisdiction over the motorists involved. Since it was assumed that these out-of-state motorists could be excluded from the state's highways, the use of the highways was deemed to imply consent by the motorist to appoint a specific state official as his agent for service of process. The agent could then be served personally within the state, thereby subjecting the out-of-state motorist to in personam jurisdiction. Shaffer v. Heitner, 433 U.S. 186, 202 (1977); *see* Hess v. Pawloski, 274 U.S. 352, 354 (1927) (upholding the constitutionality of the Massachusetts motorists consent statute).

[29] The presence theory was used for the first time as the sole basis for jurisdiction in 1914. International Harvester Co. v. Kentucky, 234 U.S. 579, 589 (1914) (antitrust suit against company having no agent in the forum state). *See generally* Note, *supra* note 13, at 921 (consent theory was not applied due to failure to serve process on the proper agent). The presence theory was used to bring International Harvester Company under the jurisdiction of Kentucky only after International Harvester was found to be doing business in Kentucky. 234 U.S. at 585. A corporation found to be present within the forum state could be sued for claims unrelated to the corporation's business within the state. Tauza v. Susquehana Coal Co., 220 N.Y. 259, 115 N.E. 915, 918 (1917) (company

corporations.[31] According to this theory, jurisdiction could be exercised only when the corporation was doing business in the state to an extent sufficient for its "presence" in that state to be inferred.[32] Courts used the consent theory or the presence theory,[33] depending on the situation, but no practical rule emerged.[34] The two theories eventually were

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soliciting orders in and shipping into New York held to be doing business within New York, and therefore present in the state). However, the presence theory could be circumvented if the corporation stopped doing business within the forum state before a suit was brought against it. In such a sitution, it was necessary to rely on the implied consent theory under which a corporation gave implied consent to be sued for all claims arising out of its business in the forum state, even if it was no longer present. Washington v. Superior Court, 289 U.S. 361, 364 (1933).

[30] While using the presence theory to deny jurisdiction in New York over a Massachusetts corporation in Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141-42 (2d Cir. 1930), Judge Hand also based his decision on considerations of reasonableness and fairness. *Id.* at 142. These same terms were later incorporated in a new standard in International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945). For a further discussion, see notes 40 through 43 and accompanying text *infra.*

[31] The theory under which a corporation was deemed to have legal existence only within the boundaries of the state of incorporation was rejected by the presence theory. *See* note 23 and accompanying text *supra. See generally* Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 582 (1958) (presence theory as defective as consent theory).

[32] "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there." Philadelphia & R. Ry. v. McKibbin, 243 U.S. 264, 265 (1917) (New York resident brought suit in New York to recover for injuries incurred while working for railroad which did business only in Pennsylvania and New Jersey).

[33] *See, e.g.*, Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 95-97 (consent theory); Hutchinson v. Chase & Gilbert, 45 F.2d 139, 142 (2d Cir. 1930) (presence theory).

[34] While solicitation alone was insufficient to subject a foreign corporation to in personam jurisdiction, Green v. Chicago B. & Q. Ry., 205 U.S. 530, 532-33 (1907) (solicitation in Pennsylvania of passengers and freight for railroad operating only in Illinois), solicitation plus shipment of orders into the forum state were held to be sufficient grounds for imposing in personam jurisdiction on a foreign corporation, International Harvester Co. v. Kentucky, 234 U.S. 579, 585 (1914) (solicitation and shipment of machinery). The following activities were held to be insufficient to sustain jurisdiction: several purchases of goods in the forum state by a foreign corporation for sale in the corporation's home state, Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 518 (1923); activities in the forum state of a company whose stock was almost entirely owned by the defendant corporation, Peterson v. Chicago, R.I. & P. Ry., 205 U.S. 364, 393-94 (1907); and use of a railroad's equipment in the forum state by connecting carriers, Philadelphia & R. Ry. v. McKibbin, 243 U.S. 264, 265 (1917). Jurisdiction over a foreign corporation was upheld where a corporation maintained an office within the forum state for the purpose of settling claims, St. Louis S.W. Ry. v. Alexander, 227 U.S. 218, 228 (1913) (New

combined into a third impractical theory that subjected any corporation "doing business" in a foreign state to that state's jurisdiction.[35]

These theories were finally rejected[36] in 1945 in the Court's decision of *International Shoe Co. v. Washington.*[37] International Shoe Company, a Delaware corporation,[38] was sued in the state of Washington for recovery of past due contributions to that state's unemployment compensation fund. International Shoe neither maintained offices nor made contracts in Washington, although its salesmen solicited sales within the state. This solicitation was held by the Supreme Court of Washington to be sufficient to constitute doing business, and the jurisdiction of the state of Washington was upheld.[39] On appeal, the United States Supreme Court held that a defendant, whether present or not within the forum state, was subject to an in personam judg-

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York action against Texas railroad company for negligence in handling of certain freight), but denied where the foreign corporation maintained an office in the forum state, but all business was consummated in the state of incorporation, Davega v. Lincoln Furniture Mfg. Co., 29 F.2d 164, 166 (2d Cir. 1928) (solicitation of furniture orders in New York by Virginia company).

[35] In 1935 the United States Supreme Court upheld the constitutionality of an Iowa statute subjecting nonresidents dealing in securities in Iowa to the state's jurisdiction. Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 628 (1935) (action against New York resident selling securities in Iowa through an agent). Under the Iowa statute, the securities business was deemed to be "exceptional" and was consequently subjected to "special regulation." Process could then be served in the forum state on any "agent or clerk" employed by the company. *Id.* at 627. *See generally* Kurland, *supra* note 31, at 584-85 (necessary to determine whether a corporation was doing business in the forum state under both the consent and presence theories).

[36] International Shoe Co. v. Washington, 326 U.S. 310, 316-17 (1945) (citing Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930)). In rejecting the presence theory, Chief Justice Stone stated that "the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process." 326 U.S. at 316-17. The fiction that a corporation's consent could be implied by the "acts of its authorized agents" within the forum state was similarly dismissed. *See* notes 25 and 26 *supra.* The Chief Justice stated that "more realistically it may be said that those authorized acts were of such a nature as to justify the fiction." 326 U.S. at 318-19 (citing Smolik v. Philadelphia & Reading Coal & Iron Co., 222 F. 148, 151 (S.D.N.Y. 1915) (denying a motion to set aside service of process on an agent designated by a foreign corporation to accept service pursuant to the New York code)).

[37] 326 U.S. 310 (1945).

[38] International Shoe maintained its principal place of business in St. Louis, Missouri, but had manufacturing plants in several states excluding Washington. These plants manufactured and distributed shoes and other footwear. *Id.* at 313.

[39] 22 Wash. 2d 146, 154 P.2d 801, *aff'd*, 326 U.S. 310 (1945). Notice was personally served on one of International Shoe's salesmen, and a copy was sent by registered mail to International Shoe's main office in St. Louis. 326 U.S. at 312.

ment[40] if he had certain "minimum contacts"[41] with that state.[42] The Court concluded that since the activities of International Shoe's salesmen were continuous and systematic and since the suit arose from those activities, it was reasonable[43] to require the corporation to defend the suit in Washington.[44]

In *McGee v. International Life Insurance Co.*,[45] the Supreme Court further expanded[46] the power of a state over foreign corporations by affirming California's assumption of jurisdiction over a corporation[47]

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[40] The departure from the jurisdictional concepts of *Pennoyer*, *see* notes 15 through 22 and accompanying text *supra*, increased the power of the forum state's courts to exercise in personam jurisdiction over out-of-state defendants. Shaffer v. Heitner, 433 U.S. 186, 204 (1976).

[41] Several factors were set forth to aid in determining if a corporation had minimum contacts with the forum state. The most important factor was whether the suit arose out of the corporation's activity in the state. The Court reasoned that:

> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

326 U.S. at 319. Other factors included whether the activities of the foreign corporation within the forum state were "continuous and systematic," *id.* at 317, and whether the corporation enjoyed the economic benefits of the state, *id.* at 319.

[42] The new standard set forth by the Court was "that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[43] After *International Shoe*, "the relationship among the defendant, the forum, and the litigation . . ." became the most important factor in determining if a foreign defendant should be subjected to the personal jurisdiction of the forum state. 433 U.S. at 204. Reasonableness was determined by comparing the inconvenience to the defendant with the plaintiff's inconvenience and the forum state's interests. The defendant's inconvenience was the main consideration since the plaintiff voluntarily submitted to the jurisdiction of the forum state by filing suit, and the state could use the principle of forum non conveniens to dismiss the suit. *See generally* Note, *supra* note 13, at 924 (balancing of interests required in determining constitutionality of assertion of jurisdiction).

[44] 326 U.S. at 320.

[45] 355 U.S. 220 (1957).

[46] Recognizing this expansion, the Court in *McGee* stated that "a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents." *Id.* at 222. *See generally* Comment, *Shaffer v. Heitner: Reshaping the Contours of State Court Jurisdiction*, 11 Loy. L.A.L. Rev. 87, 93 (1977).

[47] 355 U.S. at 221-22. In 1944, a California resident purchased a life insurance policy from an Arizona corporation. This corporation's policies were subsequently assumed by

that had enjoyed the state's economic benefits, even though those benefits were minimal.[48] In reaching this conclusion the Court stressed the considerable state interest in providing a forum in which the state's citizens could sue foreign corportions to enforce unpaid insurance claims.[49]

The trend toward expansion of state jurisdiction over foreign corporations[50] ended with the Court's decision in *Hanson v. Denckla.*[51] In *Hanson*, the Court ruled that a trustee's response to correspondence originating in Florida could not, by itself, satisfy the requirement of minimum contacts under *International Shoe.*[52] Forum convenience was held to be irrelevant[53] absent a purposeful availment by the defen-

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International Life, a Texas corporation with no other contacts with California. The insurance premiums were paid until the insured's death in 1950, but International Life refused to pay, claiming that the insured committed suicide. The beneficiary of the policy obtained a judgment in California against International Life. Process was served by registered mail to the defendant's principal place of business in Texas. The beneficiary sued on the judgment, but the Texas courts refused to enforce it, ruling that the California court did not have personal jurisdiction over International Life. *Id.*

[48] The Court reasoned that a suit arising out of a single contract having a "substantial connection" with the forum state was sufficient to satisfy the requirements of due process. *Id.* at 223.

[49] The Court reasoned "that California has manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims." *Id.* The Court then considered the expense and inconvenience that would be incurred by a California resident if required to bring suit in Texas and observed that most of the necessary witnesses were to be found in California. *Id. McGee* was not the first case in which the Supreme Court emphasized the interest of the state. *See, e.g.*, Hess v. Pawlowski, 274 U.S. 352, 356 (1927) (state interest in promoting safe use of highways by residents and nonresidents).

[50] *See generally* Comment, *supra* note 46, at 107-08 (*Hanson* ended trend toward relaxing minimum contacts standard).

[51] 357 U.S. 235 (1958).

[52] Dora Donner, a Delaware resident, established a trust in that state. She later moved to Florida but continued to instruct the trustee in matters concerning the Delaware trust. Mrs. Donner died in 1952, and her will was admitted to probate in Florida. Two of Mrs. Donner's daughters petitioned a chancery court in Florida for a declaratory judgment, claiming that the estate had not been effectively administered. In an attempt to gain jurisdiction over all indispensable parties, process was served personally on several of the defendants in the suit. Others, including many in Delaware who were indispensable parties, were given notice by regular mail. *Id.* at 238-43.

[53] Chief Justice Warren stated that, in the absence of minimum contacts, a defendant could not be forced to defend himself in a foreign forum no matter how slight the burden. *Id.* at 251. Further, the Court held that a state's courts did not acquire jurisdiction over all parties to a dispute simply because that state's law could be properly applied to the dispute. *Id.* at 248-49. The Court reasoned that a state "does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law." *Id.* at

dant[54] of the privilege of pursuing activities in the forum state.[55] The limitation of jurisdiction begun by *Hanson* was continued in *Shaffer v. Heitner*,[56] a suit involving a Delaware court's power to exercise quasi in rem jurisdiction over a nonresident's stock in a Delaware corporation.[57] While ending the traditional distinction between in rem and in personam actions,[58] the Supreme Court held that the defendant must

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[54] The Court announced that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253. This seems to require that the defendant voluntarily choose to associate with the forum state before the state's courts could exercise jurisdiction over him. *See generally* Note, *supra* note 13, at 934-35.

[55] Thus, *Hanson* and *McGee* differed in two important respects. While *Hanson* required a purposeful act of availment by the defendant, *McGee* did not. *See* note 54 and accompanying text *supra*. Also, while *McGee* gave considerable emphasis on forum convenience, *see* note 49 and accompanying text *supra*, *Hanson* held this factor to be irrelevant in deciding whether there had been minimum contacts with the forum state, *see* note 53 and accompanying text *supra*. *See generally* Comment, *supra* note 46, at 109 (*Hanson* found *McGee* to involve an act within the forum state). However, the rules of *Hanson* have been attacked as being only a means of avoiding an unfair decision by refusing to give it full faith and credit under the guise that the Florida court lacked jurisdiction. *See generally* Zammit, *Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668, 677 (1975) (means of avoiding unfair Florida law).

[56] 433 U.S. 186 (1977).

[57] The Greyhound Corporation, incorporated in Delaware, Greyhound Lines, Inc., a wholly owned subsidiary of the Greyhound Corporation, and 28 present and former officers of the corporation were named as defendants in a stockholders' derivative suit brought by a nonresident stockholder. It was alleged that the corporation lost a substantial amount of money due to mismanagement by the defendant officers. Pursuant to a motion by the plaintiff, a sequestration order was issued which required the seizure of all shares of corporate stock owned by the defendant officers, all of whom were nonresidents of Delaware. The defendants were notified of the suit by certified mail and by publication in a county newspaper. The defendant officers contended that the sequestration procedure denied them due process and moved to quash service of process and to vacate the sequestration order. The defendants' motions were denied, and this action by the trial court was affirmed by the Delaware Supreme Court. Greyhound Corp. v. Heitner, 361 A.2d 225, 228-29 (1976), *rev'd sub nom.* Shaffer v. Heitner, 433 U.S. 186 (1977).

[58] For a further discussion of in rem, quasi in rem, and in personam actions, see note 11 and accompanying text *supra*. Since *Shaffer*, jurisdiction cannot be asserted simply because the property is located within the state. *See* Comment, *supra* note 46, at 87. The Court held that:

> [I]n order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of persons in a thing." The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe*.

commit some act in the forum state before being subject to that state's jurisdiction.[59] The Court also indicated for the first time that the foreseeability of litigation might be considered in determining jurisdiction.[60]

In *Kulko v. Superior Court*,[61] an attempt was made to set forth criteria for determining the purposefulness of a defendant's contacts with the forum state.[62] This determination of purposefulness was com-

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433 U.S. at 207. Further, the Court declared the minimum contacts standard the basis for determining all state court jurisdiction. *Id.* at 212. The minimum contacts test was affirmed recently as the standard for quasi in rem actions in Rush v. Savchuk, 100 S. Ct. 571 (1980). *Rush* concerned an Indiana automobile accident in which the plaintiff, an Indiana resident, was injured while riding with the defendant, also an Indiana resident. The plaintiff moved to Minnesota where he brought suit and attempted to gain quasi in rem jurisdiction by garnishing the contractual obligation of the defendant's insurer to defend and indemnify the defendant. The plaintiff moved to add the insurer, which did business in Minnesota, as a party to the suit after the insurer disclaimed any obligation to the defendant. Both the defendant and his insurer then moved for dismissal of the complaint for lack of jurisdiction, but their motion was denied. *Id.* at 575-76. The contacts of the defendant's insurance company with Minnesota were held to be insufficient to satisfy the standard of minimum contacts necessary to subject the defendant to the forum state's jurisdiction. *Id.* at 579-80.

[59] The Court held that receiving economic benefit from the forum state was not, by itself, enough to support jurisdiction. There also must have been evidence that the defendant had committed some act within the state. 433 U.S. at 213, 215. However, the *Shaffer* Court never defined what constituted such an act. *See* Comment, *supra* note 46, at 122. After finding that the defendants had no connection with Delaware, the Court refused to consider the state's interest. 433 U.S. at 214-15. Until *Shaffer*, jurisdiction could have been based on a showing of a valid state interest. *Id.* at 223-24 (Brennan, J., concurring and dissenting); *see, e.g.*, Traveler's Health Ass'n v. Virginia, 339 U.S. 643, 647-48 (1950) (high state interest in requiring foreign insurance companies to comply with state guidelines); note 49 and accompanying text *supra*.

[60] The Court stated that the "appellants had no reason to expect to be hauled before a Delaware court." 433 U.S. at 216. Since the defendants had no reason to foresee a suit in Delaware, further discussion of the effect of foreseeability on a determination of jurisdiction over nonresident defendants was unnecessary. *Id. See generally* Comment, *supra* note 46, at 112-13 (reference to foreseeability only confused extent of endorsement by the Court). Justice Brennan urged, however, that even though the defendants had never "set foot" or committed any "acts related to the cause of action" in the state, Delaware should have been able to exercise jurisdiction in the suit "for jurisdiction can be based strictly on out-of-state acts having foreseeable effects in the forum state." 433 U.S. at 226 (Brennan, J., concurring and dissenting).

[61] 436 U.S. 84 (1978).

[62] After emphasizing the need to fulfill the *Hanson* requirement of a purposeful availment, *id.* at 93-94, the Court stated that purposefulness could be inferred from any of three situations, all taken from prior decisions. The first situation was one in which an injury occurring within the state was caused by a wrongful act outside the state. *Id.* at 96-97. *Compare id. with* Hess v. Pawloski, 274 U.S. 352, 356 (1927) (upholding a measure

bined with a balancing test[63] to ascertain the fairness of the state's

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requiring "a nonresident to answer for his conduct in the State where arise causes of action alleged against him"). The Court failed to state whether anything more was needed in order for the forum state to assert jurisdiction. 436 U.S. at 96-97. *See generally* Note, *Constitutional Law—Kulko v. Superior Court*, 12 CREIGHTON L. REV. 905, 920 (1979) (questionable whether physical harm within the forum state is sufficient to support jurisdiction). It would appear, however, that something more in the form of reasonable foreseeability should be required. *Id. See generally* Gorfinkel & Lavine, *Long Arm Jurisdiction in California Under New Section 410.10 of the Code of Civil Procedure*, 21 HASTINGS L.J. 1163, 1196-97 (1970) (the important consideration is whether it is foreseeable that any of the defendant's products would be used in the forum state). The second situation involved the solicitation of business from a state resident for economic gain, but the Court did not provide a practical test for inferring purposefulness from this circumstance. 436 U.S. at 96-97. *Compare id. with* McGee v. International Life Ins. Co., 355 U.S. at 223 (economic benefits, though minimal, sufficient for jurisdiction). The last situation mentioned by the Court was a controversy arising out of a contractual relationship with a state resident. 436 U.S. at 96-97. *Compare id. with* Hanson v. Denckla, 357 U.S. at 252 (action evolved out of an agreement having no connection with Florida). When a nonresident enters into a contract having a substantial connection with the forum state, it can be inferred that the nonresident is aware of the possibility of a lawsuit arising out of the contract. *See generally* Casad, *Long Arm and Convenient Forum*, 20 U. KAN. L. REV. 1, 23 (1971) (not unfair to require suit in state known by defendant to be affected by the transaction at issue). Since the nonresident is aware of the possibility of suit, he can make provisions for this contingency. *See generally* Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300, 322 (1970) (potential for subjection to a state's jurisdiction easily ascertainable when contract made). The nonresident also has access to the courts of the forum state as a plaintiff for controversies arising out of the contractual relationship within the state. It is therefore fair to hold the nonresident subject to the jurisdiction of the forum state. *See generally* Note, *supra*, at 929 (nonresident who purposefully takes benefits and protections of state subject to that state's jurisdiction).

[63] Under the balancing test, foreseeability of litigation determines the fairness of making a nonresident defend himself in the forum state. *See generally* Note, *supra* note 62, at 932-33 (court linking determination of purposeful contact with a balancing test). This foreseeability flows directly from the defendant's contacts with the forum state, and depends on a finding of purposefulness from which the required foreseeability must arise. 436 U.S. at 98-100. Unless there has been a purposeful act by the defendant and, therefore, anticipation of suit in the forum state, jurisdiction will generally be denied on the basis that the burden on the defendant outweighs the plaintiff's and state's interests. 436 U.S. at 98-101, 433 U.S. at 216-17. Generally the plaintiff's interest, consisting primarily of a desire to avoid incurring the hardship and expense of litigation in the defendant's state, will have little effect on the balancing test. *See* Note, *supra* note 62, at 935. Relevant state interests include providing resident plaintiffs with a forum, McGee v. International Life Ins. Co., 355 U.S. at 223; avoiding a multiplicity of lawsuits, Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960, 966 (1957) (suit by musicians attacking the validity of a collective bargaining agreement made by their agent); protecting resident's health and welfare, Olberding v. Illinois Cent. R.R., 346 U.S. 338, 341 (1953) (action against foreign truck owner arising out of a collision with a railroad overpass causing a derailment); and trying the suit under its substantive laws, 433 U.S. at 225-26 (Brennan,

assertion of jurisdiction.[64] Relying on this two part test, the Court held that a nonresident divorced father's act of allowing his daughter to live with her mother in the forum state[65] did not amount to a purposeful contact with the state.[66] Because of this lack of purposeful contact, the father could not have reasonably anticipated being required to defend a suit in that state. Applying the balancing test, the Court concluded that the burden on the defendant outweighed the interests of the state.[67] Although this test seems functional in most situations, it is not practical when a foreign defendant is alleged to have caused physical harm within the forum state.[68] It then becomes extremely difficult to determine whether the defendant purposefully initiated a relationship within the forum state.[69]

In the instant case, the Court reasoned that since the relationship between the defendant and the forum must be such that the corporation can reasonably be required to defend against a suit brought there, consideration must be given to the defendant's burden.[70] Furthermore, since due process prohibits a state from rendering a valid in personam judgment against any defendant who does not have minimum contacts with the forum state,[71] the state may also lose its power to render a

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J., concurring and dissenting). *See generally* Note, *supra* note 62, at 937 (state's interest limited in amount of influence on balancing test).

[64] 436 U.S. at 98-101.

[65] Pursuant to a separation agreement, later incorporated into a divorce decree, the couple's two children were to stay with their father in New York during the school year and with their mother in California during certain vacation periods. The couple's daughter decided to remain in California during the school year and flew to California using a ticket purchased by her father in New York. The mother brought suit in California for increased child support and the father was served with process under California's long arm statute. *Id.* at 87-90.

[66] *Id.* at 94-96.

[67] *Id.* at 98-100.

[68] *See* note 62 and accompanying text *supra*.

[69] *See generally* Casad, *supra* note 62, at 19 (difficulty in proving purposefulness); Note, *supra* note 62, at 919 (jurisdiction most likely imposed where nonresident takes action directly affecting forum state).

[70] World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559, 564 (1980). The Court held that the defendant's burden will be compared to other factors. These factors include the state's interest, the plaintiff's interest, the interest of the entire interstate court system, and the shared interest of all the states. *Id.* at 564.

[71] *Id.* The Court reaffirmed the minimum contacts standard of *International Shoe Co. v. Washington*. *See* note 41 and accompanying text *supra*. This standard protected the defendant from having to defend a suit in an inconvenient forum and prevented a state from imposing on the sovereignty of sister states. The Court indicated that where it is unreasonable or unfair to require the defendant to defend a suit in the forum state, the forum will be deemed inconvenient. 100 S. Ct. at 564.

binding judgment because of the due process clause.[72] Applying these considerations the Court concluded that since the defendants' only tie with Oklahoma was the accident, and since this isolated occurrence was insufficient to satisfy the minimum contacts requirement, Oklahoma could not subject the defendants to its jurisdiction.[73] In reaching this conclusion the Court rejected the respondent's argument that jurisdiction existed because the accident was foreseeable,[74] noting that foreseeability alone was not sufficient to satisfy due process requirements.[75] Since the necessary foreseeability is derived from the fact that the defendant can reasonably expect to defend himself in the forum state because of his contacts there,[76] a corporation can be subjected to the jurisdiction of a state only when there has been purposeful availment of the privilege of conducting activities within it.[77] Finally, the Court rejected the respondent's argument that the financial gain derived from the defendants' relationship with the forum state was sufficient to establish jurisdiction, because any benefits the defendants received from Oklahoma were too indirect to justify its exercise of jurisdiction.[78]

In dissent, Justice Brennan[79] argued that jurisdiction can be supported by less significant contacts as long as other considerations make its exercise fair and reasonable.[80] Since the interests of the state and

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[72] This is true even if the defendant's inconvenience of litigation in the forum state is minimal, if there is a high state interest or if the forum state represents the most convenient place for the suit. 100 S. Ct. at 565-66.

[73] *Id.* at 566.

[74] *Id.* at 566-67.

[75] *Id.* at 566. The respondents argued that since the automobile was designed to be mobile, an accident in Oklahoma could have been foreseen. *Id.* In response the Court noted that in *Hanson* Mrs. Donner's move to Florida was foreseeable, but jurisdiction was denied. *See* note 52 and accompanying text *supra*. Similarly, in *Kulko* the daughter's move to California to live with her mother was foreseeable, but again jurisdiction was denied. *See* notes 65, 66 and accompanying text *supra*. 100 S. Ct. at 566.

[76] 100 S. Ct. at 567. The Court reasoned that while it was foreseeable that an automobile sold in New York would be driven to Oklahoma, it was not reasonable to grant Oklahoma jurisdiction over the defendants based on this single act. *Id.*

[77] *Id.* When there is such purposeful availment by the corporation, it has notice of the possibility of litigation within the forum state. The corporation can then act to protect itself through insurance, by raising the price of its products to absorb the expected increase in cost, or by ending all ties with the state if the risk is too great. *Id.*

[78] *Id.* at 567-68.

[79] *Id.* at 580 (Brennan, J., dissenting).

[80] *Id.* at 581. Justice Brennan reasoned that a determination of the significance of contacts with the forum is only one consideration in deciding fairness and reasonableness. Other considerations are the interests of the state and other parties in pursuing the case in the forum and the actual burden incurred by the defendant in defending the suit

other parties are of equal importance with the interests of the defendant, the extreme emphasis historically placed on the defendant's interests is unnecessary to ensure fairness.[81] Therefore, since there was a state interest[82] and since the defendants purposefully sold a product that obviously was made for travel throughout the United States[83] and derived substantial economic benefit in the process,[84] it was reasonable to subject the defendants to the jurisdiction of Oklahoma.[85]

Justice Brennan argued for a return to the logic of *McGee* which gave great weight to the interest of the forum state in determining jurisdiction.[86] He emphasized that a trial does not have to be held in the state with the "best contacts;" only the constitutional minimum enunciated in *International Shoe*[87] is required.[88] Combining the heightened state interest with the defendants' connection with the forum through the mobility of the automobile, the dissent reasoned that Oklahoma should have jurisdiction over the defendants.[89] This argument, taken to its logical conclusion, would subject virtually all manufacturers and distributors, without regard to size, to the jurisdiction of the court systems of the fifty states. While the automobile is made for travel and can be expected to be taken into any state, the same argument of mobility may be applied to most products. Although a particular product

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in the forum state. *Id.*

[81] *Id.* at 586. The relationship among the defendant, the plaintiff, the litigation, and the forum state are all important in determining whether a state can exercise jurisdiction over the defendant. Jurisdiction should not be determined by the relationship existing between any two of these parties. *Id.*

[82] Justice Brennan found a high state interest by considering several factors. The accident out of which the suit arose took place in Oklahoma, and the plaintiffs underwent medical treatment there. Furthermore, the witnesses and evidence necessary for the suit were in Oklahoma. Justice Brennan also recognized Oklahoma's interest in enforcing its highway safety laws. *Id.* at 583-84.

[83] *Id.* at 584-85. In a separate dissent, Justice Blackmun reasoned that the mobility of the automobile was the critical factor in the instant case. Justice Blackmun would therefore have upheld Oklahoma's assertion of jurisdiction over the defendants. *Id.* at 570-71 (Blackmun, J., dissenting).

[84] *Id.* at 585. In dissenting, Justice Marshall emphasized the economic benefit that the defendants had derived from the forum state. *Id.* at 569 (Marshall, J., dissenting). Justice Marshall reasoned that since the defendants had voluntarily chosen to become part of a nationwide chain of distribution and service from which they derived substantial income, they should have been amenable to a suit in a foreign forum arising out of this voluntary act. *Id.* at 568-71. Justice Marshall was joined by Justice Blackmun.

[85] *Id.* at 587-88.

[86] *See* note 49 *supra.*

[87] 326 U.S. at 316; *see* note 42 *supra.*

[88] 100 S. Ct. at 582.

[89] *Id.* at 584-85.

may be "designed to be used in one place,"[90] it is certainly foreseeable that such a product may be taken into other states when the product's owner moves. Surely it was not the intention of the dissent to require the Court to differentiate between products that are self-propelled and those that are not.

The majority recognized that there must be a limit to a small business' amenability to suit in a foreign forum.[91] In so doing, the Court refined the purposeful availment requirement first announced in *Hanson*[92] and further defined in *Kulko*.[93] According to *Kulko*, purposefulness may be inferred where a wrongful act outside the state causes injury within the state;[94] yet the Court failed to give any practical guidelines for drawing the inference.[95] The Supreme Court, in its opinion in *World-Wide*, set forth a test to determine the defendant's intent when injury is caused by a product injected into interstate commerce by a foreign corporation. While it is foreseeable that most products will find their way into other states far from the state in which they were originally purchased, this foreseeability alone would not support jurisdiction over a foreign corporation. The new test examines the reasonableness of the state's exercise of in personam jurisdiction.[96] Under the new standard, it may be inferred that a corporation has purposefully availed "itself of the privilege of conducting activities within the forum state . . ."[97] if an attempt has been made to derive economic benefit by either: (1) selling a product directly to the residents of the forum state, or (2) selling the product under conditions that make it reasonable to believe that a substantial quantity of the merchandise sold will find its way into the forum state.[98] Conditions which must be considered under this second category are the nature of the product sold,[99] the area directly served by the business, and the forum state's proximity to this area.[100] This new test should effectively differentiate between a regional business such as World-Wide, which is far removed from the forum state, and one which has some significant indirect connection

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[90] *Id.* at 584.
[91] *Id.* at 565-66.
[92] *See* note 54 *supra*.
[93] *See* note 62 *supra*.
[94] *Id.*
[95] *See* notes 68, 69 and accompanying text *supra*.
[96] 100 S. Ct. at 567.
[97] 357 U.S. at 253.
[98] 100 S. Ct. at 567.
[99] *Id.* at 568.
[100] *Id.* at 566-67.

with the forum state. For example, had World-Wide served all states west of the Mississippi River, Oklahoma's exercise of jurisdiction would have been reasonable. Oklahoma residents could have been expected to buy World-Wide's products on more than an isolated basis because of their proximity to the area served, the mobility of the automobile, and, in the case of new automobiles, the potential for savings due to the size of the purchase.

If the corporation's activities in the forum state are found to be purposeful, it is still necessary to balance the interests of the defendant, the plaintiff, and the state.[101] Historically, the burden on the defendant has been the primary consideration.[102] *World-Wide,* however, gives added importance in the balancing test to the interests of the plaintiff, the state, and the interests of the entire interstate court system.[103] The majority also emphasized that before the balancing test is necessary[104] the defendant must have some contact with the forum state. However, the majority failed to consider the situation in which the plaintiff cannot afford to sue in the defendant's jurisdiction.[105] This situation may arise where the cost of suing in a foreign forum is disproportionate to the loss sustained or where the plaintiff simply does not have the money to pursue a cause of action in a foreign forum. This factor should be an important part of the consideration of the plaintiff's interest. Where the plaintiff's financial status is a factor, the court should relax its interpretation of the minimum contacts standard so that the plaintiff's inability to maintain suit "does not offend 'traditional notions of fair play and substantial justice.' "[106] This will necessitate a future compromise between the majority's rigid interpretation of the minimum contacts standard and the dissent's extremely liberal interpretation. By retaining the test of purposefulness as defined in *World-Wide* and modifying the balancing test, this compromise can be reached. While the interests of the interstate court system and the state are important in theory, the important practical interests are

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[101] *Id.* at 564.

[102] *See* note 63 *supra.*

[103] The plaintiff has an interest in obtaining a forum in which his suit can be efficiently and conveniently tried. The state's interest rests in settling the dispute, and the interstate court system has an interest in efficiently resolving all suits. 100 S. Ct. at 564.

[104] *Id.* at 565.

[105] Recognizing this problem, Justice Brennan stated that "[a]ccording jurisdiction does not expand liability except in the marginal case where a plaintiff cannot afford to bring an action except in the plaintiff's own State." *Id.* at 584 n.9.

[106] 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); *see* note 42 *supra.*

those of the plaintiff and defendant. The balancing test should reflect this practical importance by weighing the defendant's interest against the plaintiff's interest, assigning them equal weight, and disregarding other factors. Under this balancing test, the plaintiff's interest should be measured by the expense of litigation in the defendant's state,[107] the nature and extent of injury, and the plaintiff's financial status. The defendant's interest should be determined solely by the burden of defending a suit in the foreign forum. This test would give substantial protection to the interests of both the defendant and plaintiff. It is apparent, however, that no matter how fair the test is, there will be many cases in which one party will suffer a great deal of inconvenience.

Gary E. Friedman

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[107] *See* note 63 *supra.*

Civil Rights—Section 1983—Municipal Corporation Is Not Entitled To Qualified Immunity For Good Faith Violations By Its Officials

Petitioner[1] brought an action for declaratory and injunctive relief[2] under 42 U.S.C. section 1983[3] in the District Court for the Western District of Missouri alleging that respondents'[4] discharge of petitioner[5] without notice and hearing violated his constitutionally protected substantive and procedural due process rights.[6] Rejecting petitioner's argument that he possessed a property interest in his job[7] and that the

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[1] The petitioner, George D. Owen, was employed by respondent city as chief of police for an indefinite term. Owen v. City of Independence, 445 U.S. 622, 625 (1980).

[2] The requested relief included a hearing on the discharge, back pay, and attorney's fees. *Id.* at 630.

[3] 42 U.S.C. § 1983 (Supp. III 1979) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[4] The respondents included the City of Independence, Missouri, City Manager Lyle W. Alberg, and the members of the city council. 445 U.S. at 630.

[5] Petitioner was discharged on April 18, 1972 by the city manager. *Id.* at 629. This action was pursuant to § 3.3(1) of the city's charter which gives the city manager sole authority to " '[a]ppoint, and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all directors, or heads of administrative departments and all other administrative officers and employees of the city . . . .' " *Id.* at 625 n.2 (quoting the city charter).

[6] The discharge followed a dispute between petitioner and respondent city manager concerning petitioner's administration of duties. An investigation was initiated by the city manager into charges that a handgun shown by property room records to have been destroyed was subsequently found in the possession of a felon. Despite the city manager's conclusion that the investigation uncovered no evidence of criminal wrongdoing and his public statement to that effect on April 13, petitioner was asked to resign. On advice of counsel, petitioner refused to resign and requested written notice of charges and a hearing to answer those charges. On April 17, the city council released a report of the investigation to the news media, and on April 18, petitioner was discharged. *Id.* at 625-29.

[7] In Owen v. City of Independence, 421 F. Supp. 1110, 1120 (W.D. Mo. 1976), *aff'd*, 589 F.2d 335 (8th Cir. 1978), *rev'd*, 445 U.S. 622 (1980), the district court stated:

> [P]laintiff did not present any credible evidence that he had either a contractual right to continued employment, or that there existed a *de facto* tenure system which gave plaintiff a legitimate expectation of continued employment.

dismissal imposed a stigma of illegal or immoral conduct on his professional reputation and therefore deprived him of a liberty interest,[6] the trial court entered judgment for respondents.[9] On remand,[10] the Court of Appeals for the Eighth Circuit reaffirmed its original finding of a fourteenth amendment violation[11] but determined that respondents, including the city, were entitled to qualified immunity from liability.[12] On writ of certiorari, the United States Supreme Court, *held,* reversed. A municipality is not entitled to qualified immunity based on the good faith of its officials as a defense to liability under section 1983 for constitutional violations. *Owen v. City of Independence,* 445 U.S. 622 (1980).

Section 1983[13] and its jurisdictional counterpart, 28 U.S.C. section 1343(a)(3),[14] originally took form in the Civil Rights Act of 1871.[15] The Civil Rights Act of 1871, in a legislative effort to control Ku Klux Klan abuses in the South during Reconstruction,[16] granted to the federal

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> Rather, a preponderance of the evidence shows that plaintiff knowingly served as Chief of Police at the will of the City Manager and was subject to discharge without notice of reasons and a hearing at any time the City Manager determined that his discharge was "for the good of the service."

421 F. Supp. at 1120.

[8] 421 F. Supp. at 1121-22.

[9] *Id.* at 1124.

[10] The court of appeals originally reversed the district court and held that petitioner had a liberty interest. Certiorari was granted, and the case was remanded for further consideration in light of Monell v. Department of Social Servs., 438 U.S. 902 (1978). 445 U.S. at 631-32.

[11] Owen v. City of Independence, 589 F.2d 335, 337 (8th Cir. 1978), *rev'd,* 445 U.S. 622 (1980).

[12] 589 F.2d at 338. Since Board of Regents v. Roth, 408 U.S. 564 (1972), and Perry v. Sindermann, 408 U.S. 593 (1972), which provided the rule on name-clearing hearings, were not decided until after the discharge, the Eighth Circuit held that the city acted in good faith without knowledge of the new ruling and was therefore immune from liability for its violation. 589 F.2d at 338.

[13] 42 U.S.C. § 1983 (Supp. III 1979).

[14] 28 U.S.C. § 1343(a)(3) (Supp. III 1979). The two statutes are usually construed as being complementary to each other, *see, e.g.,* Examining Bd. v. Flores de Otero, 426 U.S. 572, 583-84 (1976) (statutes intended to be and are complementary); Lynch v. Household Fin. Corp., 405 U.S. 538, 543 n.7 (1972) (same), and will be referred to jointly as section 1983 unless a distinction between the two is necessary.

[15] Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13. *See also* Lynch v. Household Fin. Corp., 405 U.S. 538, 545 n.9 (1972) (Civil Rights Act of 1871 modeled after Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27); CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (1871) (same).

[16] *See* CONG. GLOBE, *supra* note 15, at 436-40 (remarks of Congressman Cobb) (noting social and political disability of blacks and violence and lawlessness of Klan); *id.* at 457 (remarks of Congressman Coburn) (acts of Klan constituted large scale attacks on

courts a broad power to award damages for constitutional deprivations.[17] Section 1983 was intended to deter future deprivations and to compensate victims of past abuses.[18] Despite this broad remedial power, the forerunner of section 1983 remained almost dormant for decades.[19] From 1939 to 1945, however, a succession of Supreme Court cases opened the way for a liberal application and interpretation of the statute.

The Court began applying the statute to areas other than racial discrimination in *Hague v. CIO*,[20] a first amendment speech case. Following this decision, the Court in *United States v. Classic*[21] interpreted the phrase "under color of" law in the criminal analogue of section 1983 as meaning the wrongdoer must be "cloaked with the

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blacks).

The Senate committee which considered the 1871 Act was labeled the "Select Committee on Southern Outrages." Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 281 n.20 (1965-1966). *But cf.* CONG. GLOBE, *supra* note 15, at 658-59 (remarks of Senator Nye) (violence in Nevada demonstrated abuse not peculiar to the South).

[17] *See, e.g.*, CONG. GLOBE, *supra* note 15, at 475-77 (remarks of Congressman Dawes in support of the Act) (Act would fully incorporate the Bill of Rights); *id.* at app. 216 (remarks of Senator Turman in opposition to the Act) (Act would transfer all constitutional causes of action, no matter how slight, to the federal courts); *id.* at app. 49-50 (remarks of Congressman Kerr in opposition to the Act) (Act is covert attempt to transfer rightfully held state jurisdiction to federal courts).

[18] *See* Carey v. Piphus, 435 U.S. 247, 256-58 (1978) (§ 1983 both deters and compensates for constitutional violations).

[19] The Act was used only 21 times from 1871 to 1920. T. EMERSON, C. HABER & N. DORSEN, POLITICAL & CIVIL RIGHTS IN THE UNITED STATES 1447-48 (3d ed. 1967), *cited in* Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483, 1484 n.3 (1977).

Until 1939 the Act was used almost exclusively to redress infringements on the voting rights of blacks. *See, e.g.*, Lane v. Wilson, 307 U.S. 268, 269-71 (1939) (holding Oklahoma statutory registration prerequisite to voting violated rights of blacks under the fifteenth amendment and gave rise to a private cause of action under the Act); Nixon v. Herndon, 273 U.S. 536, 539-40 (1927) (under the Act, a private cause of action arises from unlawful denial of voting rights under a Texas statute violating fourteenth amendment); Myers v. Anderson, 238 U.S. 368, 378 (1915) (holding election officers liable for civil damages under the Act for enforcement of grandfather clause in violation of fourteenth amendment).

[20] 307 U.S. 496 (1939). The Committee for Industrial Organization sought to enjoin city officials from enforcing ordinances prohibiting public meetings and distribution of printed matter without permits. The Court sustained the injunction even though the constitutional deprivations did not involve racial discrimination. *Id.* at 512 (opinion of Justice Roberts).

[21] 313 U.S. 299 (1941).

authority of" state law.[22] Three years later, the Court, in *Snowden v. Hughes*,[23] adopted the position that the statute applied to actions by state officials in violation of state law.[24] And finally, in *Screws v. United States*,[25] another criminal case, the Court defined "under color of" law as "under pretense of" law.[26]

Although *Screws* and *Classic* dealt with criminal actions, the lower federal courts quickly expanded their doctrines to civil suits involving official police[27] and non-police[28] actions and to suits for economic inju-

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[22] In *Classic*, several Commissioners of Election in Louisiana were indicted for willfully altering and falsely counting and certifying the ballots of voters cast in a primary election for a representative in Congress. The Court held that actions "cloaked with the authority of" law and "under color of" law were proper grounds for the indictments. *Id.* at 326.

[23] 321 U.S. 1 (1944).

[24] In *Snowden* a candidate for state office was denied certification in a primary election as the party nominee in violation of state law. Although refusing the requested relief because no federal right had been violated, the Court recognized that "illegality under the state statute can neither add to nor subtract from [the] constitutional validity" of the defendant's actions. *Id.* at 11.

[25] 325 U.S. 91 (1945).

[26] In *Screws*, a sheriff, deputy, and policeman were indicted under the criminal analogue of § 1983 for beating a black man to death and thereby depriving him of life without due process of law. Although overstepping the authority granted by state law, the defendants were acting "under pretense of" law. The Court stated: "Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it." *Id.* at 111.

[27] *See, e.g.*, Coleman v. Johnson, 247 F.2d 273, 273 (7th Cir. 1957) (permitting action against police officers and warden for wrongful detention); Geach v. Moynahan, 207 F.2d 714, 715, 717 (7th Cir. 1953) (allowing action against police officers for unlawful search and seizure, police brutality, and wrongful detention); Davis v. Turner, 197 F.2d 847, 847 (5th Cir. 1952) (allowing action against sheriff and deputy for wrongful detention and illegal search and seizure); Valle v. Stengel, 176 F.2d 697, 698, 699, 701 (3d Cir. 1949) (allowing action against chief of police for deprivation of use of public park); McShane v. Moldovan, 172 F.2d 1016, 1017, 1023 (6th Cir. 1949) (allowing action against constable and others for conspiring to deprive plaintiff of fair trial and for false arrest); Pickering v. Pennsylvania R.R., 151 F.2d 240, 249 (3d Cir. 1945) (explicitly adopting the "under pretense of" law interpretation in a police brutality action), *cert. denied*, 332 U.S. 776 (1947); State *ex rel.* Temple v. Central Sur. & Ins. Corp., 102 F. Supp. 444, 446 (W.D. Ark. 1952) (sustaining action against sheriff, deputy, city marshall, and state trooper for wrongful detention and brutality); Gordon v. Garrson, 77 F. Supp. 477, 479-80 (E.D. Ill. 1948) (sustaining complaint against superintendent of state farm and physician for brutality); Refoule v. Ellis, 74 F. Supp. 336, 337-38 (N.D. Ga. 1947) (sustaining complaint against police officers for wrongful detention).

By 1958, application of the *Screws* interpretation in civil suits was so well accepted, courts routinely applied it to police brutality cases. *See* Jackson v. Duke, 259 F.2d 3, 7 (5th Cir. 1958) (allegations of police brutality "under color of law" sufficient basis for federal jurisdiction for civil rights deprivation).

[28] *See, e.g.*, Hoffman v. Halden, 268 F.2d 280, 289 (9th Cir. 1959) (complaint against

ries.[29] Courts have since recognized that almost any common law tort committed by an individual state officer,[30] as well as systemic conduct,[31] may be viewed as a constitutional violation and sustain a cause of action under section 1983.[32] It was not until *Monroe v. Pape*,[33] however, that the United States Supreme Court applied more liberal inter-

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county health officer for wrongful detention held to state a cause of action); Erickson v. Hogan, 94 F. Supp. 459, 460 (S.D.N.Y. 1950) (injunction against district attorney's use of property illegally taken by law enforcement officers). *But see* Francis v. Lyman, 216 F.2d 583, 588 (1st Cir. 1954) (interpreting statute as remedy for racially motivated discrimination only).

[29] *See, e.g.*, Cobb v. City of Malden, 202 F.2d 701, 705 (1st Cir. 1953) (sustaining action alleging that teachers' contract rights were violated by city officials); Glicker v. Michigan Liquor Control Comm'n, 160 F.2d 96, 97, 101 (6th Cir. 1947) (sustaining action alleging that revocation of plaintiff's liquor license was intentional, discriminatory, and politically motivated); Burt v. City of New York, 156 F.2d 791, 791-92 (2d Cir. 1946) (sustaining action alleging discriminatory denial of permit applications for architects).

[30] *See, e.g.*, Russ v. Ratliff, 538 F.2d 799, 804 (8th Cir. 1976) (§ 1983 allows action for damages against police officer for excessive force), *cert. denied*, 429 U.S. 1099 (1977); Curtis v. Everette, 489 F.2d 516, 518 (3d Cir. 1973) (§ 1983 allows action by prisoner against prison officials for failure to restrain fellow prisoners), *cert. denied*, 416 U.S. 995 (1974); Scott v. Vandiver, 476 F.2d 238, 241 (4th Cir. 1973) (§ 1983 supports action for damages against temporary police officers). *But cf.* Paul v. Davis, 424 U.S. 693, 712 (1976) (rejected suit brought under fourteenth amendment for defamation by police officer since it was not a deprivation of a liberty or property interest).

[31] *See, e.g.*, Rhem v. Malcolm, 507 F.2d 333, 335-36 (2d Cir. 1974) (federal court has power to give declaratory and injunctive relief against due process and equal protection infringement in the Manhattan penal system by state and city officials under § 1983); Wyatt v. Aderholt, 503 F.2d 1305, 1313-14 (5th Cir. 1974) (mentally retarded patient's fourteenth amendment right to proper treatment can be enforced in action against a state). *See also Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1173 (1977) (federal courts have power to give declaratory and injunctive relief in suits against state and local educational, law enforcement and penal systems).

[32] One recent constitutional development is the right to a name-clearing hearing for a government employee allegedly stigmatized in the course of his discharge. *See* Paul v. Davis, 424 U.S. 693, 711-12 (1976) (reputation alone is not a liberty or property interest which requires notice and hearing); Perry v. Sindermann, 408 U.S. 593, 601-03 (1972) (notice and hearing required prior to termination of employment if property interest is created by de facto tenure); Board of Regents v. Roth, 408 U.S. 564, 578 (1972) (no hearing required for nontenured position); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (stigma placed on individual's name by police official a sufficient liberty interest to require notice and hearing). *See generally* Lawson, *Paul, Bishop & Meachum—Short-lived Aberrations or Plagues-on-Developing Due Process-Protections?*, 20 How. L.J. 419, 443 (1977) (discussing recent restrictions on right to name-clearing hearing); 18 B.C. INDUS. & COM. L. REV. 545, 551 (1977) (same).

[33] 365 U.S. 167 (1961). In this case, plaintiffs sought damages from both individual police officers and the City of Chicago for invasion of their constitutional rights by a warrantless search and a subsequent unauthorized detention of Mr. Monroe. *Id.* at 169.

pretations to civil actions.[34] *Monroe* injected vitality into section 1983 by broadening its application,[35] but it also granted absolute immunity to municipal corporations[36] on the rationale that Congress in 1871 did not intend to include municipalities as "persons" amenable to suit under the statute.[37]

Subsequent to *Monroe*, many lower courts devised theories to limit or circumvent a municipality's immunity. One theory was that although the "non-person" rule in *Monroe* applied in cases in which state law had not withdrawn municipal immunity, it did not apply where state law subjected municipalities to suit in other actions.[38] Another theory developed by the lower courts was that *Monroe* prohibited only damage suits and was inapplicable to suits seeking injunctive relief.[39] Finally, some courts avoided the "non-person" rule of *Monroe* by employing the rationale of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[40] to hold that money damages were available against a municipality directly under the fourteenth amendment rather than section 1983.[41] However, the Supreme Court subse-

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[34] *Id.* at 187. The Court extended the *Screws* "under color of" law definition to civil actions and adopted *Classic*'s inclusion of actions in violation of state law. *Id.*

[35] *Id.* at 172. The Court held that Congress, in enacting the section, intended to provide a remedy for deprivation of constitutional rights, privileges, and immunties by an official's abuse of position. *Id.* The expansion by *Monroe* of the types of sustainable causes of action has produced an explosion in the number of suits brought under § 1983. Federal civil rights suits have risen from a total of 300 filed in 1960 under all the civil rights acts combined, to over 19,000 filed in 1976 under § 1983 alone. *Developments in the Law—Section 1983 and Federalism, supra* note 31, at 1136 n.7.

[36] 365 U.S. at 187.

[37] *Id.* at 191. To determine the legislative intent, the Court relied heavily on the debate concerning the proposed Sherman amendment to the 1871 Civil Rights Act to place liability on municipal corporations for personal injuries resulting from acts of violence occurring within the municipality. CONG. GLOBE, *supra* note 15, at 663. The amendment was rejected by the House of Representatives because the members determined that Congress had no constitutional power to impose any obligation upon a municipality. *Id.* at 800-04. The Court reasoned that since Congress refused to impose liability through the Sherman amendment it probably did not intend to include municipalities within the word "person" in the Civil Rights Act itself. 365 U.S. at 191.

[38] Carter v. Carlson, 447 F.2d 358, 369 (D.C. Cir. 1971) (municipal liability under § 1983 governed by state law), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973).

[39] Dailey v. City of Lawton, 425 F.2d 1037, 1038-39 (10th Cir. 1970) (injunction granted against municipal activity violating fourteenth amendment).

[40] 403 U.S. 388, 397 (1971) (money damages awarded in suit brought directly under fourth amendment against police officers for violation of privacy rights).

[41] Stapp v. Avoyelles Parish School Bd., 545 F.2d 527, 531 n.7 (5th Cir. 1977) (federal question jurisdiction would support a cause of action for damages brought directly

quently rejected the first two theories[42] and expressly refused to decide the validity of the third.[43]

In *Monell v. Department of Social Services*,[44] the Supreme Court overruled *Monroe* to the extent that it held municipalities were not "persons" under section 1983.[45] After a lengthy reexamination of the legislative history of the Civil Rights Act of 1871, the Court in *Monell* concluded that the *Monroe* Court had misconstrued the legislative intent of the 1871 Congress.[46] Although the Court held that municipali-

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under fourteenth amendment).

[42] *See* City of Kenosha v. Bruno, 412 U.S. 507, 513 (1973) (municipalities immune from § 1983 actions for both damages and injunctive relief); Moor v. County of Alameda, 411 U.S. 693, 706-07 (1973) (municipality immune from § 1983 actions despite withdrawal of immunity under state law). *But see* Levin, *supra* note 19, at 1497 (court's silence on issue of officer's liability in his "official capacity" in *City of Kenosha v. Bruno* created loophole whereby the plaintiff may bring suit against a municipal officer in his official capacity; officer has authority to use "machinery of government" to take any corrective action ordered). *Cf.* Edelman v. Jordan, 415 U.S. 651, 664-69 (1974) (limiting "official capacity" remedies to prospective injunctive relief, not retroactive awards requiring disbursement of public funds).

[43] Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977) (issue of whether *Bivens*-type of action allowable not decided).

[44] 436 U.S. 658 (1978).

[45] *Id.* at 663.

[46] *Id.* at 690. The Court in *Monell* distinguished between the 42d Congress' reluctance to impose liability on a municipal corporation for the acts of others, *see* CONG. GLOBE, *supra* note 15, at 663, and the creation of a civil remedy against a municipality that had itself infringed federal rights. 436 U.S. at 669. Citing remarks by the author, Representative Shallabarger, CONG. GLOBE, *supra* note 15, at app. 68, concerning the broad interpretation to be afforded the Act, the Court concluded that the statute covered legal, as well as natural, persons for the purpose of liability. 436 U.S. at 683. In addition, the Court cited remarks by Representative Bingham, CONG. GLOBE, *supra* note 15, at app. 84, concerning Congress' intent to overrule Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833), a case affording no cause of action against a city in a condemnation without compensation suit. 436 U.S. at 686-87. Further, the Court determined that Supreme Court cases prior to the enactment of the statute had established that for all intents and purposes, municipalities were persons. *See* Cowles v. Mercer County, 74 U.S. (7 Wall.) 118, 121 (1868) (municipal corporations treated as natural persons), *cited in Monell*, 436 U.S. at 687-88; Louisville R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1844) (corporation created by and doing business in state is treated as a natural person). Finally the Court in *Monell* noted that the Dictionary Act of 1871, ch. 71, 16 Stat. 431, passed only months before the Civil Rights Act, defined "person" as extending to "bodies politic and corporate." 436 U.S. at 688. Although the Court in *Monroe* considered the same Dictionary Act and construed its definition of "person" as a permissive one, 365 U.S. at 191, the Court in *Monell* focused on remarks during the debate on the Dictionary Act by Senator Trumbull in which he used interchangeably the words "may" and "shall." CONG. GLOBE, 41st Cong., 3d Sess. 775 (1871), *noted in* 436 U.S. at 689-90 n.53. The *Monell* Court concluded that Congress therefore intended the definition to be

ties were persons amenable to suit under section 1983, it rejected a theory of respondeat superior for municipal liability[47] and expressly refused to decide whether a municipality is entitled to some form[48] of qualified good faith immunity from liability.[49]

On its face, section 1983 allows no immunity from liability,[50] but when the immunity is well grounded in common law and supported by strong policy, the Supreme Court has recognized it.[51] The Court first recognized an immunity to suit under the forerunner of section 1983 in *Tenney v. Brandhove*[52] which was subsequently cited with approval in *Scheuer v. Rhodes*[53] and *Imbler v. Pachtman.*[54] In *Scheuer,* the Court relied upon both a common law doctrine and policy considerations in justifying the extension of a qualified immunity to executive officers for discretionary acts performed in the course of their official conduct.[55] Similarly, the Court in *Imbler* extended the common law abso-

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mandatory. 436 U.S. at 689-90 & n.53. The Court also concluded that if no mandatory construction were given to the Dictionary Act, there would be no "rules of construction" of the Dictionary Act as was intended by its authors. *Id.*

[47] 436 U.S. at 694. The Court stated:

> We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id.

[48] *See* 1979 WIS. L. REV. 943, 948 n.32 (discussing whether *Monell* Court mistakenly referred to "official" rather than "qualified" immunity).

[49] 436 U.S. at 701. The courts of appeals, in considering the question of qualified municipal immunity based on the good faith of municipal officers, are divided. *Compare* Paxman v. Campbell, 612 F.2d 848, 855 (4th Cir. 1980) (en banc) (granting good faith immunity) *and* Sala v. County of Suffolk, 604 F.2d 207, 211 (2d Cir. 1979) (same) *with* Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569, 577 (7th Cir. 1975) (refusing to extend qualified immunity to government officials) *and* Hander v. San Jacinto Junior College, 519 F.2d 273, 278 (5th Cir. 1975) (same).

[50] Imbler v. Pachtman, 424 U.S. 409, 417 (1976) (no tort immunity on face of § 1983).

[51] *See id.* at 417 (§ 1983 read in harmony with general tort immunities).

[52] 341 U.S. 367, 376 (1951) (historical absolute immunity of legislators for official actions extended to suits brought under predecessor of § 1983).

[53] 416 U.S. 232, 239 n.4 (1974).

[54] 424 U.S. 409, 417 (1976); *accord,* Procunier v. Navarette, 434 U.S. 555, 561 (1978) (qualified immunity for prison officials and officers); O'Connor v. Donaldson, 422 U.S. 563, 577 (1975) (qualified immunity for superintendent of state hospital); Wood v. Strickland, 420 U.S. 308, 322 (1975) (qualified immunity for local school board members); Pierson v. Ray, 386 U.S. 547, 554 (1967) (absolute immunity for state judges).

[55] 416 U.S. at 239-40. The Court's conclusion was based on the common law doctrine that the "king can do no wrong" and the policy considerations of: (1) the injustice of

lute immunity of a prosecutor from malicious prosecution suits to proscribe the same action brought under section 1983.[56]

Because of the confusing dual character of municipalities as governmental bodies and corporations,[57] no consistent municipal immunity developed at common law.[58] Municipal immunity,[59] originally an extension of the sovereign immunity of the state,[60] was adopted in America during the early nineteenth century.[61] However, criticism of this doctrine became widespread,[62] and several states legislatively abol-

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subjecting an officer to liability who is required by his position to exercise discretion, and (2) the danger of an officer's decreased willingness to execute his office with decisiveness and judgment. *Id.*

[56] 424 U.S. at 427-28.

[57] "Municipal corporations are regarded as having a rather curious dual character, which has given the courts a great deal of difficulty, and has left the law in a tangle of disagreement and confusion." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 977 (4th ed. 1971). This confusion stems from the fact that while a municipality is a governmental subdivision with all the attendant powers and responsibilities of a governmental body, it is also a corporate entity sharing in the special relationships and interests of corporations generally. *Id.*

[58] *See* Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955) (holding United States liable for damages caused by Coast Guard's negligent operation of a lighthouse). *See generally* W. PROSSER, *supra* note 57, at 981-82 (conflicting areas of liability for municipalities).

[59] [I]n the absence of any statute to the contrary, they [municipal corporations] have the privilege and immunity of the state; they partake of the state's prerogative of sovereignty, in that they are exempt from private prosecution for the consequences of their exercising or neglecting to exercise the governmental powers they possess.

1 T. SHEARMAN & A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 253, at 468 (5th ed. 1898).

[60] The first case to extend the immunity of the state to a municipality was Russell v. Men of Devon, 100 Eng. Rep. 359 (1788), *noted in* W. PROSSER, *supra* note 57, at 978 & n.74.

[61] *See* Smith & Singer, *Limitations on Federal Judicial Power in Civil Rights Cases: "Persons," Eleventh Amendment, Immunities, Vicarious Liability*, 14 WAKE FOREST L. REV. 711, 730 (1978) (discussing recognition of municipal immunity from tort claim for damages).

Governmental immunity of municipalities was never completely accepted by American courts because it runs contrary to two concepts: (1) in tort law, liability follows negligence, and (2) the constitutional guarantee that a person is entitled to a legal remedy for personal and property injuries. 18 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 53.02, at 104 (3d rev. ed. 1977).

[62] *See, e.g.*, Antieau, *The Tort Liability of American Municipalities*, 40 KY. L.J. 131, 133, 147-49 (1952) (criticism of municipal immunity); Borchard, *Government Liability in Tort* (pts. 1-3), 34 YALE L.J. 1, 129, 229 (1924-1925) (same); Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41, 56 (1949) (same). *See generally* W. PROSSER, *supra* note 57, at 978 & n.80 (citing authorities criticizing municipal immunity).

ished municipal immunity.[63] The courts have also sought methods to circumvent[64] municipal immunity. Originally, courts limited governmental immunity[65] by recognizing the governmental-proprietary distinction in municipal functions.[66] This distinction[67] allowed courts to impose liability upon a municipal entity for proprietary functions while still recognizing sovereign immunity for governmental acts.[68] Some

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[63] *See, e.g.*, MICH. COMP. LAWS ANN. §§ 691.1401-.1406 (1968 & Supp. 1980); OR. REV. STAT. §§ 30.260-.300 (1979).

[64] *See, e.g.*, Jeakins v. City of El Dorado, 143 Kan. 206, 53 P.2d 798, 800 (1936) (city liable for sewage nuisance); Kurtigian v. City of Worcester, 348 Mass. 284, 203 N.E.2d 692, 694 (1965) (city liable for maintenance of a nuisance even when acting in its governmental capacity); Gaines v. Village of Wyoming, 147 Ohio St. 491, 72 N.E.2d 369, 372 (1947) (city liable for maintenance of a nuisance even when acting in its police power).

[65] "The fact of the matter is that the theory whereby municipalities are made amenable to liability is an endeavor, however awkward and contradictory, to escape from the basic historical doctrine of sovereign immunity." Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955).

[66] This distinction was based on the dual character of the municipal entity. The governmental functions are those which only the government can adequately perform for the benefit of the citizen. Proprietary functions, on the other hand, are those which might easily be performed by a private corporation. This distinction, as applied by the various courts, is unclear. W. PROSSER, *supra* note 57, at 979-83; *see* McGinley v. City of Cherryvale, 141 Kan. 155, 40 P.2d 377, 379 (1935) (city liable for employee negligence when acting in its proprietary capacity); Bean v. City of Moberly, 350 Mo. 975, 169 S.W.2d 393, 397 (1943) (no municipal liability for breach of duty in connection with governmental acts); Fidelity Laboratories, Inc. v. Oklahoma City, 191 Okla. 473, 130 P.2d 834, 836 (1942) (city not liable for damages resulting from passage of ordinances as a governmental function). This distinction is recognized in every jurisdiction except South Carolina and Florida. W. PROSSER, *supra* note 57, at 979.

[67] "Logically . . . there is no reason why a line should be drawn between some governmental functions and others. But at least it has the virtue of mitigating the injustices of the anachronous doctrine of governmental immunity." Bingham v. Board of Educ., 118 Utah 582, 223 P.2d 432, 441 (1950) (Wolfe, J., dissenting).

[68] *E.g.*, Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081, 1090 (6th Cir. 1978) (governmental-proprietary distinction determines limits of immunity in Tennessee); Rieser v. District of Columbia, 563 F.2d 462, 474 & n.64 (D.C. Cir. 1977) (sovereign immunity of the District of Columbia limited to nonproprietary functions); Nathaniel v. City of Moss Point, 385 So. 2d 599, 601 (Miss. 1980) (recovery precluded when municipal function is governmental in nature); Tucker v. City of Okolona, 227 So. 2d 475, 476 (Miss. 1969) (municipality liable for negligent performance of a proprietary duty); *cf.* Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 284-85 (1973) (some state governments liable for "proprietary functions," but not "governmental functions"); Parden v. Terminal R.R., 377 U.S. 184, 192 (same). *See generally* E. MCQUILLIN, *supra* note 61, at 104-08 (development of governmental-proprietary distinction). This distinction has resulted in conflicting classifications within and among the jurisdictions. *Id.* at 105.

The Supreme Court, in referring to the distinction, has stated: "A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More

courts have recently taken the further step of abrogating municipal immunity for governmental as well as proprietary functions.[69] Even these courts, however, have continued to recognize governmental immunity for "discretionary" or legislative decisions concerning public policy.[70] Absent these exceptions, municipalities have been held liable for tort in the same manner as any other corporation,[71] and the recent trend has been to limit rather than expand municipal immunity.[72]

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than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound." Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955).

[69] *See, e.g.*, Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 458, 11 Cal. Rptr. 89, 90 (1961) (rejecting all governmental immunity from liability for torts). *See generally* E. McQUILLIN, *supra* note 61, at 106-07 (trend toward abrogation of governmental immunity); Smith & Singer, *supra* note 61, at 730 (governmental immunity of municipalities abrogated in about half the states). This immunity is based not on the shared sovereign immunity of the state but rather on the concern for separation of powers. W. PROSSER, *supra* note 57, at 986 & n.67.

[70] *See* Papelian v. State Dep't of Motor Vehicles, 65 Cal. App. 3d 958, 136 Cal. Rptr. 665, 667 (1976) (discretionary issuance of driver's license to applicant could not afford basis for liability of state or Department of Motor Vehicles for death of motorist whose vehicle collided with applicant's vehicle); Elmer v. City of St. Petersburg, 378 So. 2d 825, 827 (Fla. Dist. Ct. App. 1979) (decision to remove police from area in which it was feared a riot might occur fell within scope of city's discretionary planning function and, hence, was immune from tort liability); Brown v. Little, 139 Ga. App. 176, 228 S.E.2d 159, 160 (1976) (absent law or ordinance requiring city to erect traffic light at intersection where plaintiff was injured, the erection and maintenance of such a signal was discretionary and city could not be held liable for failure to perform such act); Young v. Wlazik, 262 N.W.2d 300, 311 (Minn. 1977) (city not liable, based on passage of 30-mile-per-hour train speed ordinance, for injuries sustained by passenger of car in collision between car and train since decision to enact ordinance was discretionary and shielded by immunity); Merrill v. City of Manchester, 114 N.H. 722, 332 A.2d 378, 383 (1974) (municipalities immune from liability for acts and omissions in the exercise of legislative or judicial function and the exercise of executive or planning function in making basic policy decision); Baker v. State Bd. of Higher Educ., 20 Or. App. 277, 531 P.2d 716, 721 (1975) (selection of appropriate site for public gathering is type of decision requiring exercise of technical judgment and thus is a discretionary function which immunizes public body from tort liability).

[71] *See, e.g.*, Knowles v. Housing Auth., 212 Ga. 729, 95 S.E.2d 659, 662-63 (1956) (state-created housing authority was public corporation which was liable for its negligent acts); Dallas v. City of St. Louis, 338 S.W.2d 39, 44 (Mo. 1960) (municipality liable for its negligence when acting as a corporation); Eversole v. City of Columbus, 169 Ohio St. 205, 158 N.E.2d 515, 518 (1959) (city liable for its negligence when performing acts relating to corporate benefit or profit).

[72] Common criticisms of the doctrine of municipal immunity include allegations that it is antithetic to American justice, that it causes the victim of governmental negligence to sustain the burden of loss, and that the burden should be borne by the unit of government responsible, distributing the loss among its citizens. *See generally* Borchard, *supra*

In the instant case the majority[73] determined that since section 1983 does not mention privileges, immunities, or defenses, and since the statute applies to municipalities as well as natural persons, then by its terms and legislative history, section 1983 contains no immunities on its face.[74] However, the Court reasoned that since qualified municipal immunity was not firmly established in the common law when section 1983 was enacted, and since there was no strong policy justification for such an immunity at that time, then Congress need not have specifically stated in the statute a wish to abolish that immunity.[75]

The Court offered two reasons why municipal corporations should not be afforded a qualified immunity to actions under section 1983.[76] First, the purpose of section 1983, to protect those wronged by abuses of governmental authority and to deter future violations of constitutional rights, would be subject to circumvention by a qualified immunity of both the municipality and its officers.[77] Second, the danger that possible personal liability would inhibit effective execution of official responsibilities is inapplicable to the question of municipal liability.[78]

In dissent, Justice Powell[79] reasoned that since the right to a due

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note 62, at 22-28 (criticism of immunity for public corporations); David, *Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit*, 6 U.C.L.A. L. REV. 1, 53 (1959) (argument in favor of liability due to availability of insurance); Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919, 921 (noting trend toward abrogation of governmental immunity).

[73] Justice Brennan authored the majority opinion and was joined by Justices White, Marshall, Blackmun and Stevens. Owen v. City of Independence, 445 U.S. 622, 624, 658 (1980).

[74] *Id.* at 635-36.

[75] *Id.* at 637-38. The majority concluded that the common law doctrine of municipal immunity was not intended to limit municipal liability under § 1983 for three reasons. First, common law municipal immunity from liability for tortious acts committed while engaged in a governmental function was abrogated by congressional enactment of § 1983 making municipalities amenable to suit. Second, the principle of municipal immunity for "discretionary or legislative" functions was based on preventing courts from substituting their judgment for that reserved to the lawful discretion of the municipality. Finally, a municipality had no "discretion" to violate constitutional rights. *Id.* at 644-50.

[76] *Id.* at 638.

[77] *Id.* at 650-51. Most governmental officers are entitled to a qualified good faith immunity from liability in § 1983 actions. If a similar immunity were extended to municipalities, violations might go unremedied, thus defeating the statutory purpose of protection and deterrence. *Id.*

[78] *Id.* at 651-56. In a suit directly against a municipality, for example, the damages award would come not from the officer's personal funds but from the municipal treasury. Therefore, the officer executing his responsibilities would not fear a personal judgment, and his performance would not be inhibited.

[79] Joining Justice Powell in dissent were Chief Justice Burger and Justices Stewart

process "name-clearing" hearing was initially announced by the Supreme Court only ten weeks after petitioner was discharged,[80] the respondent city should not be charged with predicting the evolution of this new constitutional principle.[81] Even if the municipality were responsible for such a prediction, Justice Powell argued that since petitioner's dismissal in this case involved a proper exercise of discretionary municipal power, and since respondent city imposed no stigma of illegal or immoral conduct on petitioner, then no "name-clearing" hearing was required under the due process clause.[82] Justice Powell concluded that since both the prior decisions of the Court under section 1983 and the concerns of Congress when the statute was enacted were contrary to a construction of strict liability of municipalities for constitutional violations,[83] and since the vast majority of current state law and common law precedent recognized municipal immunity,[84] then municipalities should be afforded a qualified "good faith" immunity under section 1983.[85]

By holding that a municipality has no qualified "good faith" immunity against section 1983 actions, the Court has removed a major obstacle from suits for deprivations of constitutionally guaranteed civil rights. Opposition to such a holding is usually supported by three arguments. The first is that qualified municipal immunity is a logical extension of qualified official immunity. However, as noted by the Court in the instant case, the considerations warranting qualified immunity for officials[86] are not applicable to a municipal defendant since the monetary relief would come from the municipal treasury and not the private

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and Rehnquist. *Id.* at 658.

[80] *Id.* at 661. The opinion which announced this right, Board of Regents v. Roth, 408 U.S. 564 (1972), was decided in June. The petitioner was discharged in April, ten weeks earlier. 445 U.S. at 651.

[81] 445 U.S. at 683.

[82] *Id.* at 662-63. Justice Powell relied heavily on the congressional debate of the Sherman amendment and Congress' reluctance to impose vicarious liability on a municipality to infer an intent not to impose strict liability on municipalities for violations caused by actions believed in good faith to be legal. *Id.* at 671-76.

[83] *Id.* at 664-76.

[84] *Id.* at 676-83. Justice Powell cited W. PROSSER, *supra* note 57, at 986-87, to support this contention. However, a close reading of this section shows the general decline of the doctrine with the only vestige of municipal immunity found in the discretionary "legislative" or "judicial" functions of government. W. PROSSER, *supra* note 57, at 986-87.

[85] 445 U.S. at 683.

[86] These considerations include the possibility that the risk of personal financial loss would deter the decision maker from independently exercising his judgment and also the injustice of subjecting an officer to liability who is required by law to exercise discretion. *Id.* at 655-56.

funds of the decision maker. Because monetary relief comes from municipal treasuries, a second argument advanced by supporters of immunity is that municipalities may be financially unable to survive section 1983 judgments.[87] However, municipalities are already amenable to suit under section 1983 since the *Monell* ruling that municipal corporations are "persons" for the purposes of a section 1983 action. Furthermore, this fear has not been well founded; the supporters of qualified municipal immunity are hard pressed to establish sound empirical evidence in their support.[88] Additionally, if the municipality is immune from liability, the loss is borne by the victim rather than the perpetrator.

Since municipalities may easily insure themselves against damages awards, the principle of equitable loss-spreading dictates that the loss be borne by the city and passed on to the populace as a whole.[89] This strain on the public fisc, when compared to the possibility of unremedied, albeit "good faith" deprivations of constitutional rights, is relatively inconsequential in light of traditional concepts of American justice.[90] Further, *Monroe* did not grant blanket immunity to municipalities in all causes of action.[91] Municipalities are amenable to suit under section 1982,[92] in *Bivens*-type actions brought directly under the Constitution,[93] and in equitable actions under section 1983.[94] Although courts in these actions are generally silent on the issue of qualified immunity, it has usually been rejected when considered.[95] A

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[87] Monell v. Department of Soc. Servs., 436 U.S. 658, 724 (Rehnquist, J., dissenting).

[88] David, *supra* note 72, at 53.

[89] Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 138-39 (1972).

[90] *Id.* at 138 & n.41.

[91] *See generally* 1979 WIS. L. REV. 943, 958-61.

[92] *Id.* at 958; *see* Morales v. Haines, 486 F.2d 880, 882 (7th Cir. 1973) (municipality liable in a § 1982 action for compensatory and punitive damages and attorney's fees). The court disregarded the qualified municipal immunity rule. *Id.*

[93] 1979 WIS. L. REV. at 955 n.66, 958.

[94] *See, e.g.*, Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 288 (6th Cir. 1974) (equitable monetary relief in the form of attorney's fees could be awarded against local officials in action for amelioration of local jail conditions, regardless of severe impact on local government funds); League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 909 (C.D. Cal. 1976) (awarding back pay under discriminatory hiring policies of the fire and police department). The court rejected a qualified immunity defense although the award may financially retard the city's affirmative action program. *Id.*

[95] *See, e.g.*, Riley v. City of Minneapolis, 436 F. Supp. 954 (D. Minn. 1977) (municipality cannot raise the qualified immunity defense in fourteenth amendment action for compensatory and punitive damages). Garner v. Giarusso, 571 F.2d 1330 (5th Cir. 1978)

qualified immunity for municipalities would be unprecedented in civil rights law.[96] Furthermore, most authorities agree that municipal liability has a deterrent effect to constitutional violations which would otherwise be defeated by recognition of an immunity.[97] In conclusion, the Court in the instant case has struck a proper balance among the competing interests involved in a section 1983 cause of action. The victim of the official conduct is assured of a remedy for his injury, the official acting in good faith is assured immunity from personal liability, the loss is spread to the entire public where it is more easily and equitably borne, and the deterrent effect of section 1983 is preserved.

Frederick G. Slabach

(qualified municipal immunity is not applicable in action for back pay and damages under 42 U.S.C. § 1981 (1976)), is the only § 1981 case that discusses and rejects the qualified immunity defense. 1979 WIS. L. REV. at 961 n.87.

[96] 1979 WIS. L. REV. at 961. The commentator observed that no previous rationale supports the qualified immunity defense for municipalities. *Id.*

[97] *Id.* at 957 n.74. The commentator's matter-of-fact statements suggest widespread acceptance of the proposition that immunity would defeat the deterrent effect of municipal liability. *Id.*

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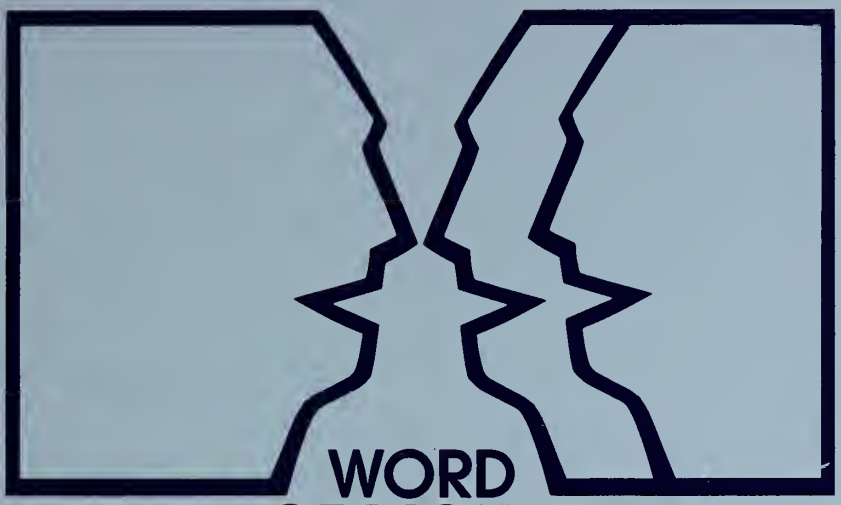

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